Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

Gina Davis,

Petitioner,

v.

The Mille Lacs Band of Chippewa Indians;
James Genia, individually and in his official capacity as the Tribe Solicitor General and supervisor of the Mille Lacs Tribal Police Department;
R. James Bankey, individually and in his official capacity as Chief of Police of the Mille Lacs Tribal Police Department,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William J. Mavity, Esq.
Counsel of Record
Pamela Marie Miller, Esq.
Mavity & Associates
1460 Southpoint Office Center
1650 West 82nd Street
Minneapolis, Minnesota 55431
(612) 885-5600

Attorneys for Petitioner

2000 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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QUESTIONS PRESENTED

Whether Exhaustion Of Tribal Remedies Is Required Where The Tribe Has Unequivocally Waived Its Sovereign Immunity From Liability For The Torts Committed Against A Plaintiff.

Whether The Exhaustion Of Tribal Remedies Doctrine Can Abolish A Federal Court's Jurisdiction To Review A Tribal Court's Assertion Of Jurisdiction Over A Federal Claim, Where The Tribal Appellate Court Refused Review Because The Plaintiff Had Missed A Deadline.

PARTIES TO THE PROCEEDING

Petitioner
Gina Davis

Respondents
Mille Lacs Band of Chippewa Indians; James Genia; and James Bankey

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 193 F.3d 990 (8th Cir. 1999). A copy of the Opinion is included in the Appendix at 1. The Opinion of the District Court for the District of Minnesota is reported at 26 F. Supp. 2d 1175 (D. Minn. 1998), and is included in the Appendix at 5.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its Opinion on October 22, 1999. On November 9, 1999, the court denied the petitioner's petition for rehearing en banc. (A63) This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Minn. Stat. Ann. § 626.90 provides:

> The [Mille Lacs Band of Chippewa Indians] agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of a law enforcement agency function conferred by this section to the same extent as a municipality under chapter 466, and the band further agrees. . . to waive its sovereign immunity for purposes of claims of this liability.

Minn. Stat. Ann. 626.84 defines a "law enforcement agency" as:

> a unit of state or local government that is authorized by law to grant full powers of arrest and to charge a person with the duties of preventing and detecting crime and enforcing the general criminal laws of the state.

STATEMENT OF THE CASE

The petitioner Gina Davis is an enrolled member of the Mille Lacs Band of Chippewa Indians. She is licensed by the State of Minnesota as a police officer and certified by the Minnesota Police Officers Training and Standards Board. From December 1992 through June of 1996 she was a tribal police officer for the Mille Lacs Band Tribal Police Department. She commenced this action against the Mille Lacs Band of Chippewa Indians, James Genia, and James Bankey in United States District Court, District of Minnesota, on August 30, 1995.

In her federal Complaint, the petitioner alleged violations of federal and state law prohibiting sexual harassment, discrimination, retaliation, and negligence. The trial court initially stayed the proceedings pending exhaustion of tribal remedies. The petitioner then commenced an action in the Band's Court of Central Jurisdiction, asking the court to rule on the issue of sovereign immunity and to return the case to federal court. The tribal magistrate judge dismissed every one of the petitioner's federal and state claims against all three defendants, on the grounds of sovereign immunity, despite the band's waiver of sovereign immunity in Minn. Stat. Ann. 626.90 and agreement to be liable for its torts and those of its officers, committed in the operation of its law enforcement agency. (A24-58)

The petitioner moved for an Order for Entry of Final Judgment in favor of the defendants Mille Lacs Band and Genia on all of petitioner's claims, and in favor of Bankey on all claims dismissed by the Special Magistrate, so she could immediately appeal the dismissal of her claims. The Special Magistrate issued this order and filed it in the Court of Central Jurisdiction on March 5, 1997. The petitioner's attorney did not receive notice of the order in a timely manner, as required by Fed. R. Civ. P. 77(d), and he missed the deadline for filing the petitioner's notice of appeal. By letter motion dated May 14, 1997, petitioner requested an extension of time within which to file a Notice of Appeal of the Special Magistrate's Order for Entry of Final Judgment. The Special Magistrate denied petitioner's motion.

The Court of Appeals affirmed in a memorandum decision dated January 9, 1998, and as part of its decision permanently disbarred petitioner's attorney from practicing in the Court of Central Jurisdiction, without affording him any procedural rights. (A13-23) The court took this severe disciplinary action and harshly criticized him in its opinion repeatedly, even though the court found that counsel's "failure to act" "did not cause undue delay or prejudice to Defendants or to the judicial proceedings in tribal court," and was not done "in bad faith or to gain some advantage over the Defendants." (A20; A13-23) The defendants moved for dismissal of the petitioner's case in federal court, and the court held that she had failed to exhaust tribal court remedies and granted the defendant's motion. (A5-12)

Minn. Stat. Ann. 626.90 confers upon the tribe the power to govern itself, that is, the power to be a true law enforcement agency, enforcing Minnesota state law against members and nonmembers, and safeguarding its community through its own efforts. Prior to the statute, the band did not have law enforcement power beyond the enforcement of tribal law against tribal members. The enforcement of state law in its community formerly belonged solely to the Mille Lacs

County Sheriff Department. The band actively sought the grant of authority conferred by the statute, which is to enforce Minnesota law concurrently with Mille Lacs County, because of the increased activity on the reservation due to the band's economic interests. (A74-101; A76-77)

In enacting this statute, the legislature envisioned a band police department that would be "top notch" and "culturally sensitive" to the needs of the tribal community, relying upon the P.O.S.T. Board's assurance that the band's law enforcement agency peace officers would uncompromisingly meet board standards. (A78; A99-100) To meet this end, the legislature required the band peace officers to "meet the same test, the same qualifications, [and] the same moral standards" as all other peace officers in Minnesota, in expectation that the band officers would perform all of the law enforcement agency functions conferred by the statute to the level of the other officers of the State. (A99-100) In exchange for acquiring the power to entrust its peace officers with the duty of enforcing Minnesota state law against members and nonmembers, the band agreed to be liable for its torts arising out of the authority conferred, and to relinquish its sovereign immunity with respect to its newly acquired status as a law enforcement agency. The band unmistakably accepted the grant of authority and the liability potential.

ARGUMENT FOR GRANTING WRIT

The petitioner Gina Davis respectfully submits:

(1) The Eighth Circuit's ruling that the band's waiver of sovereign immunity to the Minnesota State Legislature does not "[do] away with the exhaustion requirement" misconstrues the law set forth in *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985), and clarified in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); conflicts with the Seventh Circuit's and Ninth Circuit's application of the

exhaustion doctrine, *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993), and *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999), as well as with *FGS v. Carlow*, 64 F.3d 1230 (8th Cir. 1995); and creates a much broader rule of exhaustion than Supreme Court precedent allows; and

(2) The Eighth Circuit's ruling that the exhaustion requirement has not been met where the petitioner had missed a deadline to obtain appellate review conflicts with *O'Neal v. Cheyenne River Sioux Tribe,* 482 F.2d 1140 (8th Cir. 1973), *National Farmers*, and *Iowa Mutual v. Laplante*, 480 U.S. 9 (1987), and transforms the exhaustion doctrine from an "unremarkable" principle of "comity," "logic," and "prudence," bestowing a privilege on tribal courts, into a jurisdictional prerequisite, in violation of clear U.S. Supreme Court precedent.

A. Exhaustion Of Tribal Remedies Is Not Required Where The Tribe Has Unequivocally Waived Its Sovereign Immunity From Liability For The Torts Committed Against A Plaintiff.

Exhaustion of Tribal Remedies is not required where "it is plain that the tribal court lacks jurisdiction over the dispute." *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999) (*citing Strate v. A-1 Contractors,* 520 U.S. 438 (1997). In the present case, the band's unequivocal waiver makes it "plain" that the tribal court lacked jurisdiction; thus, the exhaustion doctrine should never have been applied. The Eighth Circuit held, however, that a statutory waiver of sovereign immunity does not affect the application of the exhaustion doctrine. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990 (8th Cir. 1999).

The court based its holding on its understanding that "the Supreme Court has stated that the issue of a tribe's **sovereign immunity** is the very kind of question that is to be decided in

the first instance by the tribal court itself." *Davis*, at 992 (emphasis added). The court cited *National Farmers* for this proposition, quoting the Court's statement that "the existence and extent of a tribal court's jurisdiction will require a careful examination of **tribal sovereignty**, the extent to which that sovereignty has been altered, divested, or diminished, [as well as a detailed study of relevant statutes, Executive branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.] We believe that examination should be conducted in the first instance in the Tribal Court itself." *Davis*, at 992 (emphasis added).

The court's reading of *National Farmers* is erroneous because the court's use of "sovereign immunity" interchangeably with "tribal sovereignty" is neither supported by *National Farmers*, nor correct. Moreover, the court's automatic application of the exhaustion doctrine without first examining the relevant "legislation" and "tribal-court adjudicatory authority," to determine whether jurisdiction "presumptively lies in the tribal court," violates *Strate*. Finally, the court's application of the exhaustion doctrine without considering the "policy of supporting tribal self-government and self-determination," clearly enunciated in *National Farmers* as the policy "favor[ing]" the doctrine of exhaustion, violates the very essence of the exhaustion doctrine.

In *Strate*, the Court held that the exhaustion doctrine was not applicable where the tribe lacked jurisdiction over the matter in controversy. The Court explained that (1) the doctrine is not automatic, but rather, applies only where jurisdiction "presumptively lies in the tribal court;"[1] and (2)

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[1] See *Id.* at 453, where the Court explained that the *Iowa Mutual* statement about presumptive jurisdiction "stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts."

jurisdiction presumptively lies in the tribal courts subject only to "controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*" – covering: (a) "nonmembers who enter consensual relationships with the tribe or its members;" and (2) "on-reservation activity of nonmembers bearing directly on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 451-453. The Court further explained that the *Iowa Mutual* statement that jurisdiction presumptively lies in the tribal courts was made "in refutation" to the argument that the diversity statute limited the jurisdiction of the tribal courts. *Id.* at 451-452. The statement, therefore, means only that jurisdiction presumptively lies in the tribal court where the only basis for denying jurisdiction is the diversity statute. *See Id.* at 451-453.

While the present case is not about a tribe asserting jurisdiction over nonmembers; it is about a "controlling provision" in a statute, and a waiver of immunity that unequivocally subjected the tribe to the jurisdiction of the federal and state courts. And while *Strate* did not address unequivocal waivers; it established guidelines for the application of the exhaustion doctrine, which equally pertain to an unequivocal waiver. *Strate* made clear that a court must not automatically apply the exhaustion doctrine, but must first analyze the facts of a case and look at the relevant statutes itself – to determine whether the tribe would have jurisdiction of the controversy.[2] Only if the court finds a presumption of

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[2] See *Strate* at 449-450: "The Court's recognition in National Farmers that tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings, and of the need to inspect relevant statutes, treaties, and other materials, does not limit Montana's instruction. As the Court made plain in Montana, the general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute. **In Montana itself, the Court examined the treaties and legislation relied upon by the Tribe and explained why those measures did not aid the Tribe's case**." (emphasis added)

jurisdiction, should the court then apply the exhaustion doctrine. The case of *El Paso Natural Gas Company v. Neztsosie,* 119 S.Ct. 1430 (1999), is not about an unequivocal waiver either, but just like *Strate, Neztsosie* requires a court to first look at the case to determine if the tribe has jurisdiction over the controversy. If the court decides against a presumption of jurisdiction for the tribe, then application of the exhaustion doctrine is not "logic[al]," would only cause "delay" and "inefficiency," and therefore, is not required. *See Id.* at 1438, n. 7; 1438-1439. In the petitioner's case, the band's unequivocal waiver erased any presumption of jurisdiction and precluded application of the exhaustion doctrine.

Strate also made clear that a tribal court's adjudicatory authority and the exhaustion doctrine are intimately tied to the "precedent to which Iowa Mutual refers," that is, the law set forth in the three cases cited in *Iowa Mutual* in explication of the "presumption" of jurisdiction in tribal court. The third case cited is *Fisher v. District Court of Sixteenth Judicial Dist. Of Mont.*, 424 U.S. 382 (1976), which the *Strate* Court explained stood for the proposition that state courts must not exercise jurisdiction over reservation disputes "if doing so would infringe on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 451-453. In *National Farmers* itself, the Court tied the exhaustion doctrine directly to this policy: "We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination." *Id.* at 856.

Like the present case, the Seventh Circuit case of *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993), is about an unequivocal waiver, and though the case precedes *Strate* by a number of years, the Seventh Circuit's analysis of the exhaustion doctrine is consistent with this Court's analysis in *Strate*. In *Altheimer*, the tribe had

entered into a commercial contract with a private corporation, and provided the corporation with a "letter of intent" promising to "waive all sovereign immunity in regards to all contractual disputes," and agreeing to "submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois." *Id.* at 807. The Seventh Circuit noted that although "it is unclear as to how broadly *Iowa Mutual* and *National Farmers* should be read, . . . even Circuits favoring a broad reading of the tribal exhaustion rule find it necessary to examine the factual circumstances of each case" to determine whether the exhaustion doctrine applies. *Id.* at 814. The court followed this directive and examined the factual circumstances of the case to decide whether the doctrine applied.

The court also looked to the policy behind the exhaustion doctrine to determine whether it would be served by applying the doctrine. The court held that the doctrine did not apply because:

> [A]pplication of the exhaustion doctrine would not serve the policies articulated in Iowa Mutual and National Farmers. . . . The Supreme Court was concerned with implementing Congress's policy of tribal self-government. The Court feared that "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."

Id. at 814-815. The *Altheimer* court further concluded that not only would application of the doctrine fail to serve the policy behind the doctrine, it would actually defeat those purposes. The court explained:

> To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-

> government and self-determination. The Tribe created SMC to enhance employment opportunities on the reservation. As the Ninth Circuit recognized, economic independence is the foundation of a tribe's self determination. If contracting parties cannot trust the validity of choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation economy may come to naught.

Id. at 815.

The facts of the present case fit perfectly within the rationale of the *Altheimer* decision, and the Eighth Circuit's automatic application of the exhaustion doctrine – without analyzing the facts of the case and the controlling statute, and without addressing the policy of exhaustion in the context of those facts – is in clear conflict with the Seventh Circuit's refusal to even apply the doctrine.

B. The Mille Lacs Band Of Chippewa Indians Unequivocally Waived Its Immunity For The Torts Committed Against The Petitioner By Its Officers Acting Within The Scope Of Their Employment Arising Out Of The Power To Charge Other Officers With The Duties Of Enforcing State Law.

Minn. Stat. Ann §626.90, incorporating the definition of "law enforcement agency" in Minn. Stat. Ann §626.84, provides that the band agrees to be subject to liability for its torts and those of its officers acting within the scope of their employment or duties arising out of the power to charge other officers with the duties of enforcing state law. The petitioner's claims fall directly within the waiver provision of the statute. The petitioner has claimed sexual harassment, sexual discrimination, and retaliation by her supervisors, that

is, by the band officials who had the power to charge her with the duty of enforcing state law. She has also claimed that the harassment, discrimination, and retaliation were committed pursuant to official policy. A municipality, hence the band, is liable under §1983 for a violation of a plaintiff's constitutional rights by action taken pursuant to official policy, that is, pursuant to a deliberate choice by a policy making official to follow a course of action. *Monell v. Department of Soc. Ser.*, 436 U.S. 658, 691 (1978). A municipality is also liable under §1983 for misconduct so pervasive among non-policymaking employees of the municipality as to constitute a custom or usage with the force of law. *Id.*

While the band has taken the position that it only waived its immunity for torts committed during the arrest of non-Indians for the violation of state law, it is inconceivable that the band's police department could have different policies toward tolerating and sanctioning harassment and discrimination and retaliation against its police officers, depending upon whether the officers are arresting Indians or non-Indians, or enforcing state law or tribal law. It is likewise inconceivable that the band could have different policies toward a supervisor's sexual harassment of his subordinate committed in the scope of his duty to charge the subordinate with the power to arrest Indians, and sexual harassment committed while charging her with the power to arrest non-Indians. (Not surprisingly, the Band's written sexual harassment policy made no such distinctions. (A102-104)) Finally, it is inconceivable that the legislature, with a view toward a "top-notch" tribal police department, comprised of culturally sensitive officers meeting the same standards as all other police officers of the state,[3] could have sanctioned sexually harassing behavior of officers by other

[3] These standards forbid sexually harassing conduct. Minn. R. 6700.1600 (1998) (A71-73)

officers, by exempting such behavior from the waiver of immunity it required from the band.

A tribe's waiver of sovereign immunity subjects the tribe to the jurisdiction of the federal courts. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). *See also Weeks Construction, Inc. v. Oglala Sioux Housing Authority,* 797 F.2d 668 (8th Cir. 1986); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8th Cir. 1998) (A tribe's waiver of sovereign immunity does not alone confer jurisdiction over the controversy on the federal courts; the waiver çonfers jurisdiction on a federal court if the court otherwise has jurisdiction.) The band's waiver in the petitioner's case was unequivocal. In *Altheimer,* an unequivocal waiver eliminated the exhaustion of remedies requirement. *See also FGS*, and *Granite Valley v. Jackpot Junction,* 559 N.W.2d 135 (Minn. Ct. App. 1997). As explained in *Granite Valley*, which relied on *Altheimer*, if a waiver does not do away with exhaustion, then the waiver is meaningless, or in the court's words – "impotent." *Granite Valley,* at 138. Tribes could waive immunity to confer a benefit upon themselves and never have to abide by the waiver. This is exactly what happened in this case. The band waived its immunity to receive full law enforcement powers equivalent to the powers conferred on a municipality by the State, but then refused to be accountable for that promise. The band even argued to the tribal court (and to the Eighth Circuit) that the waiver did not count because it never incorporated the waiver into its own laws. (A30-31) And yet, on the word of the band's representative in the legislative hearings, the Minnesota State Legislature incorporated the waiver into state law.

The Eighth Circuit has held that "the application of the exhaustion doctrine depends on the purposes of exhaustion being served." *Krempel v. Prairie Island Indian Community,* 125 F.3d 621(8th Cir. 1997). A general exhaustion requirement serves to strengthen tribal governments, and to

"aid the reservation Indian in maintaining a distinct cultural identity." *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973). In *Rosebud Sioux Tribe of South Dakota v. Driving Hawk*, 534 F.2d 98 (8th Cir. 1976), the court held that the "purpose of [the] exhaustion requirement in cases arising under the Indian Civil Rights Act is to foster tribal self-government and cultural identity; federal courts should infringe as little as possible on the authority of an Indian tribe to govern itself." In *Margorie Necklace v. Three Affiliated Tribes*, 554 F.2d 845, 846 (8th Cir. 1977), the court held, "a balancing process is evident; that is, weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights."

As in *Altheimer*, a requirement of exhaustion in the present case fails to recognize the band's clear waiver of liability, and defeats, rather than furthers, the goals of promoting self-government, self-sufficiency, and the distinct cultural identity of Indian tribes. The Minnesota Supreme Court has held, "it is important to the development of the Indian tribes that they be given a greater control over their own destinies. If they are to be permitted to form corporations to conduct semi-governmental activities, they must of necessity be permitted to waive immunity from suit with respect to those activities." *Duluth Lumber v. Delta Development, Inc.*, 281 N.W.2d 377 (Minn. 1979). In the statute, the legislature clearly gave the band greater control over its own destiny, but it also accepted from the band its promise to waive its immunity for torts committed in exercising that control. In *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), where the tribe had "generated waste dumped at [the] sites," the tribe had to "share responsibility with BIA and HIS for bringing the dumps into compliance." Here, where the tribe accepted the legislative grant of law enforcement power; it must accept the responsibility that the legislature intended as the adjunct to

that power. Otherwise, the band not only may lose its "credibility" and ability to enter into future agreements; it may lose the power it gained in this agreement – if the legislature rescinds that power based upon the band's duplicity in accepting the power without intending to abide by the waiver provision.

C. The Exhaustion Of Tribal Remedies Doctrine Cannot Abolish A Federal Court's Jurisdiction To Review A Tribal Court's Assertion Of Jurisdiction Over A Federal Claim, Where The Tribal Appellate Court Refused Review Because The Plaintiff Had Missed A Deadline.

Supreme Court precedent prohibits the exhaustion of remedies doctrine from serving as a jurisdictional prerequisite. *Strate*, at 451-453. As explained by the Ninth Circuit, "*Strate* rejects the argument that exhaustion of jurisdictional issues in tribal court is a precondition to jurisdiction in federal district courts." *County of Lewis v. Allen*, 141 F.3d 1385 (9th Cir.1998) opinion withdrawn; rehearing en banc,163 F.3d 509 (9th Cir. 1998). In *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (1973) where the plaintiffs had missed the deadline to file their notice of appeal to the tribal junior court and had "apparently" missed the statute of limitations to institute an original action in the tribal superior court (the court felt plaintiffs had an equitable argument that the statute should have been tolled), the court ordered the district court, in the event that the tribal court found the case barred by the statute of limitations or the tribe would not consent to suit, to "**proceed with the trial and decide the case on its merits without reference to any further necessity of exhausting tribal remedies.**" *Id.* (emphasis added) Having found that the exhaustion doctrine had applied to the type of case brought by the plaintiffs, the court nevertheless held "each case will require a balancing of

the merits of exhaustion against the harm an exhaustion requirement might threaten with regard to those who claim their constitutional rights have been violated."

In *National Farmers*, the Court made clear that a federal court has jurisdiction, under 28 U.S.C. §1331, to review a tribal court's assertion of jurisdiction, as this is a "federal question." *Id.* at 845. In *Iowa Mutual,* the Court confirmed that a tribal court's assertion of jurisdiction is "ultimately subject" to federal court review. *Id.* at 9. There was no qualifier to this statement, that is, the Court did not say that the tribe's assertion of jurisdiction is subject to federal court review provided there are no procedural mishaps along the way. Also, in *Iowa Mutual*, the Court even more clearly established: "the exhaustion rule enunciated in *National Farmers* [does] not deprive the federal court of jurisdiction," as exhaustion is "required as a matter of comity, not as a jurisdictional prerequisite." *Id.* at 16, n.8.

In *Strate,* the Court accepted the reasoning of the Eighth Circuit that *National Farmers* was never meant to supercede *Montana v. United States*, 450 U.S. 544 (1981). The Court "reiterate[d] that *National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement, a prudential rule, based on comity," and explained that "these decisions do not expand or stand apart from Montana's instruction of the inherent sovereign powers of an Indian tribe." *Id.* at 453. The Court also made clear that exhaustion is "not an unyielding requirement," is "not jurisdictional," and is "[not] anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accepting or rejecting jurisdiction.'" *Id.* at 449 n. 7; 451; 450 (quoting *National Farmers*).

There is no basis in the exhaustion of remedies doctrine for denying the petitioner the right to federal review of a tribal court's assertion of jurisdiction over her claims. A tribal appellate court's decision not to review a tribal magistrate's dismissal of an action cannot forever bar federal

review, for tribal appellate review is not a prerequisite for federal review. The law is absolutely clear that the exhaustion of remedies doctrine is not a jurisdictional prerequisite; it is a matter of comity and deference toward tribal courts. Comity – "the willingness to grant a privilege"[4] – affords a tribal appellate court the "opportunity" to review a lower court's decision, and to refine that decision and "rectify any errors," so that the federal court will have the "benefit" of the tribal court's "expertise." *National Farmers*, at 856-857. If the appellate court declines to exercise this privilege, it merely loses the advantage that the privilege offers. It does not gain the power to forever deny the plaintiff her day in court.

There is no question in this case that the tribal appellate court had the "opportunity" to review the lower court determination. It chose not to. The exhaustion of remedies doctrine is not a procedural weapon; it is the grant of a privilege, a privilege that does not become a right because an attorney misses a deadline. Deference to the tribal court system "merely permit[s]" the tribal court to initially determine its own jurisdiction. *See Iowa Mutual*, at 14. When the tribal court decides to disbar an attorney and discard his client's case, on the basis of conduct which the U.S. Supreme Court has declared "excusable neglect," *see Pioneer Investment Services v. Brunswick Assoc. Ltd.*, 507 U.S. 380 (1993), that court cannot complain that it did not have the opportunity to fix the mistakes in a tribal magistrate's opinion.[5] Rather than a caustic opinion

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[4] "Comity" is defined as: courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will." Black's Law Dictionary 267 (6th ed. 1990).

[5] While the tribal appellate court stated that it had no authority under Band law to allow the appeal (A17), (relied upon by the Eighth Circuit, at 992), the tribal appellate court also stated that the court had the authority "in its discretion" to order an extension of time for filing a notice of appeal in the case of "excusable neglect." (A19)

emphasizing and reemphasizing how egregious the petitioner's attorney behaved, the appellate court could have offered its expertise on the basis of the tribal court's jurisdiction, for the benefit of the federal court.

In *National Farmers*, the Court sent the parties back to tribal court to "**allow**" the tribal court the "opportunity" to develop a "full record," and in *Iowa Mutual*, the Court sent the parties back to tribal court to "**give**" the tribal appellate court the "full opportunity to consider the issues before them and to rectify any errors." *National Farmers*, at 856; *Iowa Mutual*, at 16. In both cases, the Court merely postponed federal court intervention until a full record could be developed in tribal court. The defendants in the present case, however, did not ask the federal court to postpone intervention. The defendants themselves brought the tribal court proceedings to a halt, and went to federal court to request dismissal of the petitioner's case. The defendants did not ask the federal court to "stay its hand" and send them back to tribal court to give them an opportunity to develop a full record. *Strate*, at 439. Indeed, they never lost that opportunity in the first place. Rather, the defendants asked the court to simply send the petitioner and her claims away.

The relief the defendants sought had nothing to do with *National Farmers* or *Iowa Mutual*; it had nothing to do with the purposes of exhaustion being served; and it had nothing to do with logic or prudence. How can it be logical for the defendants to complain that they were "denied" the opportunity to review the lower tribal court decision when they refused to review it? And how can it be prudent for the court to dismiss the petitioner's case on the basis of a doctrine which is "[nothing] more than a prudential exhaustion rule, in deference to the **capacity** of the tribal courts to **explain** to the parties the precise basis for accepting or rejecting jurisdiction?" *Strate* quoting *National Farmers*, at 450 (emphasis added). Logic, prudence, and the exhaustion of

remedies doctrine require that this case be litigated in federal court.

CONCLUSION

The Eighth Circuit's automatic application of the tribal exhaustion doctrine, in the face of the band's clear waiver of sovereign immunity, and its use of the doctrine as a jurisdictional prerequisite, represent a serious step backward in the development of the law of exhaustion since *National Farmers*. In *Strate*, the Court took great care to explain that *National Farmers* and *Iowa Mutual* do not create an automatic exhaustion rule. *Strate* makes clear that the exhaustion of remedies doctrine does not confer jurisdiction where jurisdiction does not separately exist; does not even apply, absent a presumption of jurisdiction; and does not stand for anything more than a "prudential" rule of exhaustion where exhaustion is otherwise required and necessary. The Eighth Circuit decision fails to even acknowledge *Strate*.

In addition, the decision violates the spirit of the exhaustion doctrine and the very concept of comity. The court's holding rewards the tribe's disingenuous waiver of immunity, insulates the tribe from the responsibility it accepted when it received a requested benefit, and validates the tribe's own efforts to undercut its self-governance and self-determination. Clearly, the court's decision is far afield from "the willingness to grant a privilege" precept that lies at the heart of the exhaustion doctrine.

Finally, the court's holding extends to tribal courts the power to forever deny a plaintiff her day in federal court to litigate a claim over which the tribal court never possessed jurisdiction in the first place. Such a result contradicts the rationale and the policy underlying the exhaustion doctrine; sets an aberrant precedent of enormous significance; and has no basis in Supreme Court precedent, nor otherwise in the law. For all of the reasons set forth above, the petitioner

respectfully requests the Court to grant her petition for a writ of certiorari to review the judgment entered in her case by the United States Court of Appeals for the Eighth Circuit.

By:

Pamela Marie Miller
Attorney Reg. No. 275220

Counsel of Record:

William J. Mavity
Attorney Reg. No. 143716
Mavity & Associates
1460 Southpoint Office Center
1650 West 82nd Street
Minneapolis, Minnesota 55431
Telephone: (612) 885-5600

Attorneys for Petitioner

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-1469

Gina Davis,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	
Mille Lacs Band of Chippewa Indians; James Genia, individually, and in his official capacity as Tribe Solicitor General and supervisor of the Mille Lacs Tribal Police Department; R. James Bankey, individually, and in his official capacity as Chief of Police of the Mille Lacs Tribal Police Department,	*	Appeal from the United States District Court for the District of Minnesota. [PUBLISHED]
Appellees.	*	

Submitted: October 18, 1999

Filed: October 22, 1999

Before BOWMAN, BEAM, and MURPHY, Circuit Judges.

PER CURIAM.

Gina Davis, a member of the Mille Lacs Band of Chippewa Indians (the Band), filed this lawsuit in federal district court[1] against her former employer, the Band, its solicitor general, James Genia, and the Band's chief of police, R. James Bankey, alleging eight separate causes of action under various federal and state laws.

The district court stayed Davis's action, pending exhaustion of tribal court remedies. Davis then filed an action in the Band's Court of Central Jurisdiction (Tribal Court). After a decision by the Tribal Court dismissing all of Davis's claims, except the claims against Bankey, brought under Band law,[2] Davis moved for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b), so as to immediately appeal the Tribal Court's decision. A final judgment was issued by the Tribal Court. Davis's attorney, however, failed to file a notice of appeal in a timely manner. The Tribal Court denied Davis's request for an extension of time to file her notice of appeal on the grounds that the motion was untimely and that there was no excusable neglect for the delay. The Court of Appeals of the Court of Central Jurisdiction (Tribal Court of Appeals) affirmed the denial and also permanently disbarred Davis's attorney from practicing before the Court of Central Jurisdiction.

The Band and Genia then moved for dismissal of the case in federal district court[3] The district court granted the motion to dismiss on the grounds that: (1) Davis had failed to exhaust her tribal court remedies and the record did not show any evidence of bias or bad faith by the tribal courts so as to excuse the failure to exhaust; and (2) the Tribal Court

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1 The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota.

[2] The Tribal Court had allowed Davis to twice amend her complaint to add equal protection claims under Band law.

[3] Bankey did not join in the motion for dismissal.

properly exercised jurisdiction over the action, thus precluding the district court from re-examining the Tribal Court's holding.[4] Davis appeals.

A party must exhaust his or her tribal court remedies before a case may be considered by a federal district court. See National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985); Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994). "At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987). Once all tribal remedies are exhausted, a federal district court has jurisdiction under 28 U.S.C. § 1331 to review the tribal court's finding of tribal jurisdiction. See National Farmers, 471 U.S. at 857; Duncan, 27 F.3d at 1300. If the federal court decides the tribal court properly exercised jurisdiction over the controversy, proper deference to the tribal court system precludes relitigation of the issues raised and resolved in the tribal courts. See Duncan, 27 F.3d at 1300.

Davis first argues that exhaustion of tribal remedies is not required in this instance because the Band has explicitly waived its sovereign immunity for the type of claims alleged in her complaint. We disagree. We do not read a purported waiver of sovereign immunity by the Band as doing away with the exhaustion requirement. In fact, the Supreme Court has stated that the issue of a tribe's sovereign immunity is the very kind of question that is to be decided in the first instance by the tribal court itself. See National Farmers, 471 U.S. at 855-56 ("[T]he existence and extent of a tribal court's

[4] The district court also ordered Davis to show cause why her claims against Bankey should not be dismissed without prejudice. After being informed by Davis that her only remaining claim against Bankey was the equal protection claim asserted under Band law, the district court subsequently dismissed the claim without prejudice.

jurisdiction will require a careful examination of tribal sovereignty.... We believe that examination should be conducted in the first instance in the Tribal Court itself."); Duncan, 27 F.3d at 1299.

Davis next argues that the exhaustion doctrine has been improperly applied because the Tribal Court of Appeals had the opportunity to rule on the merits of her case but refused to hear her appeal. Again, we disagree. In its decision, the Tribal Court of Appeals noted that it simply had no authority under Band law to permit the late appeal. We do not think that the exhaustion requirement has been satisfied when the absence of tribal appellate review stems from the plaintiffs own failure to adhere to simple deadlines. Finally, Davis argues that the exhaustion requirement should be excused because the Tribal Court is biased and it exercised jurisdiction over her case in bad faith. Having carefully reviewed the record, we agree with the district court's conclusion that there is no support for Davis's claim of bias or bad faith on the part of the tribal court system.

Because we affirm the district court's decision on the basis of Davis's failure to exhaust her tribal remedies, we do not reach the merits of the district court's alternative holding that the Tribal Court properly exercised jurisdiction over the case.

For the foregoing reasons, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

GINA DAVIS,

Plaintiff.

v.

THE MILLE LACS BAND OF CHIPPEWA INDIANS, JAMES GENIA, AND R. JAMES BANKEY,

Defendants.

5-95 CIV 187

ORDER

Mavity & Associates, by PAMELA M. MILLER, Esq., Minneapolis, Minnesota, appeared on behalf of Plaintiff.

Lockridge, Grindal, Nauen & Holstein, P.L.L.P., by LORENZ F. FETT, JR., Esq., Minneapolis, Minnesota, appeared on behalf of Defendants.

This matter is before the Court upon the motion of defendant Mille Lacs Band of Chippewa Indians ("the Band") and its solicitor general, defendant James Genia, for dismissal with prejudice of plaintiff Gina Davis's complaint. The moving defendants claim that Davis failed to fully exhaust her tribal court remedies, the Tribal Court properly exercised jurisdiction over Davis's claim, and the Tribal Court judgment precludes further litigation in United States District Court. Davis argues that her failure to exhaust tribal court

remedies is excused because of the Tribal Court's bias, and that the Tribal Court does not have jurisdiction over her claims. Because there is no evidence of bias excusing Davis's failure to exhaust tribal court remedies and because the Tribal Court correctly determined it had jurisdiction over Davis's claims, the Tribal Court's judgment is entitled to deference and will not be disturbed. Accordingly, Davis's complaint will be dismissed with prejudice as to the Band and Genia. The Court will also order Davis to show cause why defendant Bankey should not be dismissed without prejudice.

BACKGROUND

The plaintiff, Gina Davis, is an enrolled member of the Mille Lacs Band of Chippewa Indians. Davis was employed as a tribal police officer by the Band from December 1992 to June of 1996. On August 30, 1995, Davis filed a complaint in this Court against the Band, the Band's Solicitor General, James Genia, and the Band's Chief of Police, R. James Bankey. Davis's complaint alleged that defendants violated federal and state laws regarding sexual harassment, discrimination, retaliation, and negligence.

Defendants filed a motion to stay or dismiss the federal proceedings pending exhaustion of tribal remedies on the grounds that a lawsuit against an Indian tribe brought by a tribal officer and occurring on tribal land was subject to tribal jurisdiction. The Court agreed and on January 16, 1996, stayed Davis's action in federal court pending exhaustion of tribal court remedies.

On February 27, 1996, Davis filed an action in the Band's Court of Central Jurisdiction ("Tribal Court"). The complaint alleged no violations of substantive tribal law, but sought a declaration by the Tribal Court that it did not have jurisdiction over the action and an order returning the case to United States District Court. The Tribal Court appointed a Special

Magistrate to hear the case. At the first scheduling conference, the Special Magistrate inquired whether Davis sought only declaratory relief from the tribal court as opposed to any substantive relief, and gave Davis until June 18, 1996 to "file an amended complaint, if she so desires to amend her complaint" to allege substantive claims. On July 9, 1996, Davis filed an amended complaint seeking both declaratory relief and alleging an equal protection claim under tribal law.

On July 19, 1996, Defendants filed a motion for summary judgment arguing that Davis failed to state a claim under tribal law and asserting sovereign immunity. On September 16, 1996, the Special Magistrate heard oral argument on Defendants' motion for summary judgment. At the hearing, the Special Magistrate allowed Davis to orally amend her complaint to state a claim under the Band's Civil Rights Code, even though such an amendment was untimely.

On September 30, 1996, the Special Magistrate issued a thirty-three page Order dismissing all of Davis's claims against the Band, dismissing Davis's claims against Genia "without prejudice to the right of Davis to file a second amended complaint pleading specific acts of malicious intent and bad faith,"[1] and dismissing all causes of action against Bankey except Davis's equal protection claim.[2] Central to the Order was the Special Magistrate's conclusion that the Tribal Court had jurisdiction over Davis's claims and that the Band had not waived its sovereign immunity.

At a hearing on February 27, 1997, the Special Magistrate agreed to enter Final Judgment on Davis's claims against the Band and Genia so that Davis could file an immediate appeal. The Final Judgment was issued and filed in the Court of

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[1] Davis never filed a second amended complaint against Genia.

[2] Bankey does not join in the pending motion for dismissal filed by the Band and Genia, and Davis's case against Bankey is still active in the tribal court.

Central Jurisdiction on March 5, 1997. However, Davis's attorney failed to file a notice of appeal in a timely matter. In a letter dated May 14, 1997, Davis requested that the Special Magistrate grant an extension of time in which to file an appeal. Davis's counsel wrote that "[t]he failure to give timely notice of our intended appeal was a mistake based on my unfamiliarity with Band Court appellate procedures." Davis's counsel also stated that he believed the Final Judgment was received in his office in mid-March while he was on vacation.

On May 22, 1997, the Special Magistrate denied Davis's request for an extension. On June 9, 1997, the Court of Appeals of the Court of Central Jurisdiction affirmed the Magistrate Judge's denial of an extension and permanently disbarred Davis's attorney from practicing in the Court of Central Jurisdiction.

STANDARD FOR REVIEW

Tribal court jurisdiction is a question of federal law. Duncan Energy v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994). Thus, a federal district court must conduct a *de novo* review of a tribal court's decision regarding jurisdiction. Once the federal court concludes the tribal correct properly exercised jurisdiction over the controversy, the federal court does not re-examine the substantive factual and legal issues decided by the tribal court. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("Unless a federal court determines that the Tribal Court lacked jurisdiction ... proper deference to the tribal court system precludes relitigation of issues raised ... and resolved in the Tribal Courts").

DISCUSSION

The Band and Genia move for dismissal of this action on two grounds. First, the moving defendants argue that Davis failed to exhaust tribal remedies and that such a failure is a bar to the Court's review of tribal court jurisdiction. Next, the moving defendants claim that even if Davis had exhausted her tribal remedies, the tribal court correctly determined it possessed jurisdiction over Davis's claim. Davis concedes that she failed to exhaust tribal remedies but opposes the Band and Genia's motion for dismissal by arguing that her failure to exhaust was excused because the tribal court was biased against her and exhaustion was futile, the Band had expressly waived its immunity in Minn. Stat. § 626.90, and the defendants and the court asserted tribal court jurisdiction in bad faith.

"[C]onsiderations of comity direct that tribal remedies be exhausted before the question [of tribal court jurisdiction] is addressed by the District Court." *Iowa Mutual Ins. Co.*, 480 U.S. at 15. The exhaustion requirement encourages the Federal Government's policy of tribal self-government, ensures that "a full record is developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed," and provides an opportunity for the tribal court system to explain its basis for asserting jurisdiction. *See Duncan Energy*, 27 F.3d at 1299-1300. Once tribal remedies are exhausted, a federal court may then review the tribal court's decision regarding jurisdiction. If jurisdiction was proper in the tribal court. "proper deference ... precludes relitigation of issues raised and resolved in the tribal court." *Iowa Mutual*, 480 U.S. at 19. Thus, the Court must answer only the following questions to resolve the pending motion: 1) was Davis' failure to exhaust her tribal remedies excused; and 2) if her failure to exhaust was

excused, did the Tribal Court have jurisdiction over Davis's action.

"At a minimum. exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the *determinations* of the lower tribal court." *LaPlante, 480* U.S. at 17. However, a party's failure to exhaust tribal remedies may be excused where:

> an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction.

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 n.21 (1985). Davis alleges that her failure to exhaust tribal remedies is excused on the grounds of bias and bad faith. There is no evidence in the record, however, to support either of these claims.

Davis's response to the pending motion brings to mind the quote by Louis Nizer that "When a man points a finger at someone else, he should remember that four of his fingers are pointing at himself" Davis strives to excuse her failure to timely appeal the Tribal Court's Final Judgment by alleging that the Special Magistrate and the Tribal Appellate Court were biased and failed to provide a fair and just forum for her action. However, Davis's attorney conceded that his failure to file a timely appeal from the Final Judgment was due to his neglect and unfamiliarity with tribal court rules. Plaintiff has presented no evidence, beyond her bare allegations, that she was treated unfairly by the tribal court system and the record actually reflects the opposite. On several occasions the Special Magistrate granted Davis special consideration, for

example, by allowing Davis to orally amend her complaint and considering arguments in Davis's favor that she had failed to raise for herself. A review of the summary judgment order written by the Special Magistrate evidences only thoughtful and careful review of the issues in Davis's action. Davis's claim that the Tribal Appellate Court treated her unfairly are also without basis. The Appellate Court ruled against Davis on the issue of her late appeal, an understandable decision that reflects no bias. In addition, the Appellate Court disbarred Davis's attorney because of his failure to monitor Davis's case and abide by the Court of Central Jurisdiction's rules. Such an act was clearly within the Appellate Court's discretion, and does not reflect bias toward Davis or her legal position. Similarly, Davis's claim of bad faith is based only on Davis's allegations, and is unsupported by the record.

Davis's failure to exhaust tribal remedies is, standing alone, sufficient grounds for granting the pending motion. However, even if Davis had exhausted her tribal remedies, there is no question the Tribal Court had jurisdiction over Davis's claims. Davis is a member of the Band, and the Defendants are tribal entities. Davis's claims involve the Band's police department, and occurred on the Band's reservation. Tribal Courts possess exclusive jurisdiction over a suit between members of its Tribe arising on its reservation. *Williams v. Lee*, 358 U.S. 217 (1959); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* at 342 (1982); *A-1 Contractors v. Strate*, 76 F.3d 930, 934-35 (8th Cir. 1996). Thus, the tribal court properly exercised jurisdiction over this action and principles of comity and deference preclude this Court from further review of the tribal court's ruling. *See Iowa Mutual Ins. Co.*, 480 U.S. at 19.

Finally, given the disposition of the Band and Genia's motion to dismiss with prejudice, the Court is unaware of any compelling reason why Davis's Claims against Bankey should remain before the Court at this time. Thus, the Court will

order Davis to show cause why the action against Bankey should not be dismissed without prejudice. Davis shall have until December 4, 1998 to respond to the Order to show cause.

Accordingly, upon review of the files, motions, and proceedings herein,

IT IS HEREBY ORDERED That:

1. Defendants Mille Lacs Band of Chippewa Indians and James Genia's motion to dismiss with prejudice is GRANTED and the action is DISMISSED with prejudice as to the Mille Lacs Band of Chippewa Indians and James Genia;
2. Plaintiff Gina Davis show cause to the Court why her claims against defendant R. James Bankey should not be dismissed without prejudice. Such a showing shall be filed with the Court on or before December 4, 1998, and if good cause is not shown by such date, plaintiff's claim against defendant R. James Bankey shall be dismissed without prejudice.

DATED: November 12, 1998

/s/
DONALD D. ALSOP, Senior Judge
United States District Court

NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDINAS

District of Nay Ah Shing

IN HE COURT OF CENTRAL JURISDICTION
COURT OF APPEALS

GINA DAVIS,

Plaintiff Appellant

vs.

THE MILLE LACS BAND OF CHIPPEWA INDIANS;

JAMES GENIA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE TRIBE SOLICITOR GENERAL AND SUPERVISOR OF THE MILLE LACS TRIBAL POLICE DEPARTMENT;

R. JAMES BANKEY, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE MILLE LACS TRIBAL POLICE DEPARTMENT,

Defendants-Appellees.

I.

INTRODUCTION

Plaintiff-Appellant Gina Davis appeals from the Special Magistrate's denial of a request to file a late appeal against

Defendants-Appellees, the Mille Lacs Band of Chippewa Indians and James Genia, for alleged violations of sexual harassment, discrimination and retaliation in the workplace based on sex, and negligence.

In this case, the Special Magistrate denied the request for additional time to file a motion to appeal because the district court has discretion to extend time only during a 30-day period after the initial 30-day appeal period. Plaintiff-Appellant's request to file a late appeal came 70 days after the commencement of the initial appeal period – ten days after the court's discretionary period to allow for an extension to appeal.

Because we conclude that the Special Magistrate proceeded under a correct view of applicable rules and law, we affirm the denial of Plaintiff-Appellant's request to file a late appeal. Furthermore, because of the egregious oversight by Plaintiff-Appellant's counsel which has had and will continue to have grave negative consequences on his client, counsel for Plaintiff-Appellant. William J. Mavity, shall be forever disbarred from practicing law in the Court of Central Jurisdiction and in any tribal court located therein pursuant to Rule No. 8 of Court Order #031. Court

II.
FACTS AND PROCEDURAL HISTORY

Gina Davis (hereinafter "Plaintiff") is an enrolled member of the Mille Lacs Band of Chippewa Indians who was formerly employed by the Mille Lacs Band of Chippewa Indians (hereinafter "the Band") as a law enforcement officer. On August 30, 1995, Plaintiff initially commenced this action in federal court against the Defendants-Appellees based on several comments made by fellow members of the tribal police department. While her complaint names the Band, James Genia, and R. James Bankey, police chief of the Mille

Lacs Tribal Police Department (all collectively referred to as "Defendants"), the complaint is essentially against her fellow officers for their alleged actions and against the Band and Genia, in his capacity as the supervisor of the Mille Lacs Tribal Police Department, for not preventing those actions.

In her federal complaint, Plaintiff alleged eight claims arising under federal and state law: (1) discrimination under the Minnesota Human Rights Act; (2) reprisal under the Minnesota Human Rights Act; (3) retaliation under the Minnesota Whistleblower Statute; (4) denial of equal protection under 42 U.S.C. § 1983; (5) denial of equal protection under 42 U.S.C. § 1985; (6) denial of equal protection under the Fourteenth Amendment to the United States Constitution; (7) negligent supervision and retention under Minnesota common law; and (8) negligent infliction of emotional distress under Minnesota common law. Pl.s Compl. (Ex. A to Tribal Ct. Compl.), A-4 to A-16.

On January 16, 1996, the U.S. District Court stayed the federal proceedings pending Plaintiff's exhaustion of tribal remedies. Davis v. Mille Lacs Band of Chippewa Indians, Civil No. 5-95-187. Order at 3 (D. Minn. Jane 22, 1996) (Alsop, Sr. J.).

Plaintiff then commenced an action in the Band's Court of Central Jurisdiction asking the Court to rule on whether sovereign immunity had been waived by the Band with respect to Plaintiff's federal and state claims and to then return the matter to federal court.

The Court of Central Jurisdiction appointed a Special Magistrate to hear the matter. Defendants moved to dismiss Plaintiff's complaint for failure to state a claim under tribal law. With the Special Magistrate's leave, Plaintiff served and filed an amended complaint realleging her claims under federal and state laws and alleging violations of the laws and the Constitution of the Minnesota Chippewa Tribe and the Mille Lacs Band.

In a decision filed in the Court of Central Jurisdiction on October 3, 1996, the Special Magistrate held that the Defendants were immune from suit under federal and state laws, dismissed all claims against the Band and Genia, and dismissed all but the equal protection claims brought under Band statutes and the Tribal Constitution against Bankey. Davis v. Mille Lacs Band of Chippewa Indians, Case No. 96CV701, Memorandum Decision and Order at 32-33 (Mille Lacs Band Ct., D. Nay-Ah-Shing, Oct. 3, 1996) (Jones, Special Mag.).

Plaintiff then moved for an Order for Entry of Final Judgment in favor of the Band and Genia on all claims brought by Plaintiff, and in favor of Bankey on all claims dismisses by the Special Magistrate, so she could immediately appeal the dismissal of claims. This Order was issued by the Special Magistrate and filed in the Court of Central Jurisdiction on March 5, 1997.

Plaintiff's counsel, however, missed the deadlines under Band and federal appellate procedures for filing her notice of appeal. Plaintiff's counsel admits that although he received an Order for Judgment shortly after March 5, 1997, it somehow passed unnoticed by Plaintiff's counsel for 70 days.

By letter-motion dated May 14, 1997. Plaintiff's counsel requested a ten-day extension within which to file a Notice of Appeal of the Special Magistrate's Order for Entry of Final Judgment filed on March 5, 1997. The grounds for the motion were that Plaintiff's counsel's failure to timely file a notice of appeal was "excusable neglect" as that term has been construed by the United States Supreme Court. In the letter to the Special Magistrate, Plaintiff's counsel stated that he "assume[s] the order was received during that time [while he was on vacation from March 14 to March 24]," and that the "failure to give timely notice of our intended appeal was a mistake based on my unfamiliarity with Band Court appellate

procedures." Ltr., William J. Mavity to Special Magistrate B. J. Jones (May 14, 1997).

In an order filed with the Court of Central Jurisdiction on May 27, 1997, the Special Magistrate denied Plaintiff's motion for an extension in the appeal period.

Plaintiff now brings this appeal based on that Order.

We read the Special Magistrate's Order as presenting the following legal issue: whether the Special Magistrate abused his discretion in refusing to permit a late filing of a notice of appeal. This opinion only addresses the actions of the Special Magistrate and does not touch upon the merits of the underlying causes of action.

III.
DISCUSSION

A.
Court has no authority to permit late appeal

The appellate rule is quite simple and clear: the district court may extend the time for filing a notice of appeal upon motion filed not later than 30 days after expiration of the time prescribed. Fed. R. Crim. P. 4(a)(5). According to Band statutes, the time prescribed for filing a notice of appeal is "thirty (30) days after the date of such judgment or order." 24 MLBSA §2501. Thus, a motion to extend time for filing a notice of appeal must be made within 60 days of the date of the order or judgment from which the party appeals.

Plaintiff's counsel, however, did not seek an enlargement of time to appeal until May 14, 1997, a total of 70 days after the final judgment was entered. Since the initial appeal period ended 30 days after the Special Magistrate's March Order, and the discretionary period to permit a late appeal ended 30 days thereafter on May 3, Plaintiff's counsel failed to meet the allowable appeal period by ten days. The court therefore had no authority to permit this late appeal.

Federal Rules of Appellate Procedure are basic, and tribal court procedures are based on these rules. The rationale behind these appellate rules is to give finality to an entered judgment. The orderly planning and management of the parties' affairs require eventual finality in a rendered decision, and that finality can only be achieved through strict adherence and interpretation of these appellate rules. Granting the court discretion in permitting a request to file a late appeal even after an allowable discretionary period has expired turns lives upside-down and adds unpredictability into an area where order and logic are paramount and necessary.

It is indeed unfortunate that Plaintiff's right to appeal is denied because of her counsel's failure to adhere to simple deadlines. This court's decision might appear harsh to a Plaintiff who might have a meritorious claim, but in a government based on a separation-of-powers doctrine like the Band's, the judiciary's role is to interpret the statutes, not to enact them. Making new laws is the job of the legislative – not the judicial – branch.

This court is mindful of the directive of one of its earlier decisions in In the Matter of the Opinion of the Solicitor General, 15-OSG-92, 92-CV-5358, which held that the "meaning of a statute must be first sought in the language of the statute itself." Only if the clear intent of the legislation would be defeated by a literal interpretation of the language should a court strain to find another interpretation to implement statutory intent.

As stated earlier, the wording of the appellate rule is plain and simple: a motion to extend time for filing an appeal must be made within 60 days of judgment. If that rule is to be altered, it must be changed by the legislative body. In the meantime, this court must interpret the statutes as best as it sees fit, and in doing so, we deny Plaintiff's appeal to extend the time period for filing an appeal.

B.

"Excusable neglect" not found

Rule 6(b)(2) of the Federal Rules of Appellate Procedure provides that the Court, in its discretion, may order an extension of time for filing a notice of appeal even after the expiration of the 30-day time period set forth in Fed. R. App. P. 4(a)(5) has run, but *only if* failure to act in a timely fashion was the result of "excusable neglect." Woods v. Allied Concord Financial Corp., 373 F.2d 733 (5th Cir. 1967).

We find no punctilio of "excusable neglect" present and reiterate that Plaintiff's counsel's egregious oversight in meeting his client's deadlines for appeal is reason enough for this court to permanently ban him from practicing in this jurisdiction.

It is undisputed that the late filing was due to the neglect of Plaintiff's counsel in filing an appeal from a judgment he himself sought to have entered, which he knew would be entered shortly after the hearing held on February 27, 1997, and notice of which he received shortly after its entry.

Plaintiff argues that her counsel's failure to timely file the notice of appeal was unintentional and is, therefore, within the Supreme Court's interpretation of "excusable neglect." Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S.Ct. 1489, 1498 (1993) (stating that the determination of what sort of neglect is "excusable" is an equitable one, taking into account all relevant circumstances surrounding the party's failure to comply with the deadlines). As Plaintiff contends, her attorney did not receive any mail or other correspondence transmitting the notice of the filing on March 5, 1997, of the Order for Entry of Final Judgment. Plaintiff further contends that had her counsel not been away on vacation and subsequently involved in jury trial responsibilities, he might have acted more promptly even without being formally notified of the filing of the Order. But

in his absence, his office staff failed to recognize the possibility that time was running on deadlines for filing.

It is irrelevant that Plaintiff's counsel's failure to act until his letter-motion of May 14, 1997, did not cause undue delay or prejudice to Defendants or to the judicial proceedings in tribal court. Nor is it relevant that his failure to timely file the notice of appeal an act done in bad faith or to gain some advantage over the Defendants.

Settled case law has clearly established that inattention by counsel will not constitute excusable neglect" under the appellate rules. *See* In re Harlow Fay, Inc., 993 F.2d 1351, 1352 (8th Cir. 1993) (holding that an attorney's financial pressures resulting in a reduced staff and relocation of his office did not excuse the late filing of a brief); Hanson v. First Bank, 828 F.2d 1310, 1314-15 (8th Cir. 1987) (holding that employee turnover was not "excusable neglect" under Bankr. R. 9006(b)(1)); Clinkscales v. Chevron U.S.A. Inc., 831 F.2d 1565, 1569 (11th Cir. 1987) (holding that attorney's busy practice was not "excusable neglect" under Fed. R. Civ. P. 6(b)); and Selph v. Council of Los Angeles, 593 F.2d 881,883 (9th Cir. 1979) (holding that confusion from moving law offices was not "excusable neglect" under Fed. R. App. P. 4(a)). These defenses to late filings – financial pressures, reduced staff, relocation, employee turnover, increased business – were uniformly rejected by the courts considering them.

Plaintiff's counsel's excuses – that he was on vacation, that he subsequently prepared for a week-long trial, and that he did not recognize the order for judgment due to the lack of a cover letter – should fare the same fate. They do not constitute "excusable neglect"; instead, they are evidence of a bad lawyer. Attorneys take vacations. They oftentimes prepare for long trials. And orders sometimes arrive in the mail without cover letters. Plaintiff's counsel failed to take simple steps to avoid missing the filing deadline. Failure to

take reasonable steps to monitor the status of a motion for judgment so that counsel knows when judgment is entered is not "excusable neglect."

In addition, Plaintiff's reliance on Pioneer Investment is misplaced. The Court in Pioneer Investment did not, as the Plaintiff would want this court to believe, hold that late filings due to carelessness should be presumed to be excusable. Rather, the Court warned that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect. . . ." Pioneer Investment at 392. In other words, tardiness without an extraordinary explanation will not suffice. In this case, Plaintiff's counsel has not and cannot supply the sort of extraordinary reason required for the court to find "excusable neglect" on the part of Plaintiff's counsel.

The Special Magistrate was well within his discretion in ruling that the reasons given by Plaintiff's counsel for missing the filing deadline by at least forty days do not constitute "excusable neglect" under Fed. R. App. R. 4(a)(5). His ruling, therefore, is affirmed.

C.
Power to Disbar

In May 1997, pursuant to 5 MLBSA § 106, the Court of Central Jurisdiction of the Non-Removable Mille Lacs Band of Ojibwe Indians adopted a set of rules for individuals practicing law before the Court of Central Jurisdiction. Rule No. 8 of this Court Order, in relevant parts, reads:

The Court of Appeals shall have original jurisdiction over cases involving the professional misconduct of any person admitted to the Mille Lacs Band Bar Association.... The Court of Appeals shall have the power to sanction members of the Mille Lacs Band Bar Association, both by imposing monetary fins and restricting the rights of a member to

practice before the Court, up to and including permanent disbarment.

Court Order No. 031, Court of Appeals, Court of Central Jurisdiction, May 23, 1997.

Since we find no punctilio of "excusable neglect" present in this case, Plaintiff's counsel's failure to file timely an appeal was both egregious oversight and negligent professional behavior. Attorneys who cannot serve their clients in the most basic functions, such as timely filing an appeal, cannot expect to continue offering their services where care and diligence are necessary. Plaintiff's counsel has clearly shown a behavior that is both adverse and detrimental to his client's well-being. Such negative consequences could have been easily avoided by simple attention.

This Court acknowledges that what has been done has already been done. Plaintiff had an opportunity to file a timely appeal. Her attorney did not do so, and the allowable time to file has expired. Therefore, plaintiff no longer has a valid right to appeal. Period. No monetary sanction will be able to make up the redress Plaintiff might have been entitled to. Plaintiff might have had a valid cause of action, but that issue is beyond the purview of this Court at this time. The issue in front of this Court is a matter of negligence and unprofessional conduct. We find that permanent disbarment from the this jurisdiction to be the appropriate sanction for plaintiff's counsel's egregious performance as a member of the Mille Lacs Band Bar Association.

Plaintiff's counsel's actions which led to circumstances of this case are not extraordinary. He went on vacation. He subsequently had a long trial. And the final order under discussion might have arrived without a cover letter. These things happen and are, in fact, a way of life. This Court cannot grant membership to its bar to an attorney who leaves

the most simplest of counsel activities undone or incomplete. Therefore, this Court permanently bars William J. Mavity from practicing in the Court of Central Jurisdiction and all its courts therein.

IV.

For the reasons set forth in this opinion, we affirm the Special Magistrate's denial of Plaintiff-Appellant's request to file a late appeal and permanently ban Plaintiff's counsel, William J. Mavity, from practicing in the Court of Central Jurisdiction and all the courts therein for failing to adhere to appeal deadlines and inadequately representing his client.

It is so ordered.

Dated this 9 day of January, 1998.

BY THE COURT:

/s/
Dorothy Sam, Chief Justice

Official Seal

/s/
Rosalie Noonday, Associate Justice

/s/
Gloria St. John, Associate Justice

NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDIANS

District of Nay-Ah-Shing

IN THE COURT OF CENTRAL JURISDICTION

Gina Davis,

Case No. 96 CV 701

Plaintiff,

vs.

The Mille Lacs Band of Chippewa Indians,

MEMORANDUM DECISION AND ORDER

James Genia, individually, and in his official capacity as the Tribe Solicitor General and supervisor of the Mille Lacs Tribal Police Department,

R. James Bankey, individually, and in his official capacity as Chief of Police of the Mille Lacs Tribal Police Department,

Defendants.

The Plaintiff, Gina Davis, has filed a complaint with this Court alleging that Defendant Bankey, the Chief of the Mille Lacs Police Department, engaged in a course of conduct, including harassment of a sexual nature and retaliation against her, all of which was condoned by Defendant Genia, Bankey's supervisor, while Davis was employed as a police officer with

the Mille Lacs Tribal Police Department. The Defendants have filed a joint motion to dismiss, or in the alternative for a more definite statement, in which they allege that all of Davis' causes of action are barred by sovereign immunity and they fail to state claims upon which relief can be granted. The Court, special magistrate B.J. Jones presiding, heard oral argument on the motions on the 16th day of September, 1996 in the Court of Central Jurisdiction courtroom in the district of Nay-Ah-Shing. Based upon the arguments heard at that time and the pleadings contained in the file herein, the Court enters the following:

MEMORANDUM DECISION

A. FACTS

1. Procedural History

The Plaintiff is an enrolled member of the Mille Lacs Band of Chippewa Indians who was formerly employed by the Band as a law enforcement officer.[1] On or about August 30, 1995 Davis filed a complaint in the United States district court for the District of Minnesota, Fifth Division, against these same Defendants in which she alleged violations of the Minnesota Human Rights Act, the Minnesota Whistle-Blower statute, 42 U.S.C. 1983, 42 U.S.C. 1985, the equal protection clause of the fourteenth amendment to the United States Constitution, and common-law claims under Minnesota law for negligent supervision and negligent infliction of emotional distress. In that complaint Davis alleged that the Defendant

[1] Since the commencement of this action in tribal court, the Plaintiff has resigned her position as a law enforcement officer. The reasons for her resignation are in dispute as the Plaintiff contends that her resignation was forced due to the illegal actions of the Defendants, while Defendants counter that her resignation was for personal reasons.

Band had waived its common-law immunity from suit by agreeing to the passage of Minnesota Statute 629.20, subdivision 2, which the Court will discuss in detail *infra*. That statute permits the Mille Lacs Band to exercise the powers of law enforcement under Minnesota law to the same extent as a municipality law enforcement agency, as that term is defined under Minnesota law. See Minn. Stat. 626.84, subd. 1(h).

The Defendants moved the federal district court to dismiss Davis' complaint, or in the alternative to stay the complaint, on the ground that Davis had failed to exhaust her tribal court remedies. See generally, Bruce Lien Co. v. Three Affiliated Tribes, et al, No. 95-2196, 1996 Lexis 22054 (8th Cir. 1996); National Farmer's Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1984). On January 16, 1996 the federal district court, the Honorable Donald D. Alsop, Senior Judge, stayed the federal proceedings "pending exhaustion of tribal remedies." Davis v. Mille Lacs Band, et al, Civil 5-95-187, Order dated January 16, 1996, at 3. The federal district court decision did not address the sovereign immunity defense invoked by the Defendants in federal court, but instead held that the issue of the Band's waiver of immunity, *vel non*, should be decided first in this court.

Davis then filed the instant action with this court. Her first complaint requested that this Court issue a determination that the Defendants could not avail themselves of the absolute defense of sovereign immunity in federal court in light of Minn. Stat. 629.20, which said determination would then constitute, according to Davis, a determination by this Court of the relevant issue before the federal court, which would then permit this matter to be returned to federal court. The Defendants moved this Court to dismiss the initial complaint on the ground that Davis had failed to state a claim under tribal law. Davis then filed an amended complaint in which she once again requested a ruling from this Court that the

Defendant Band had waived its immunity from the federal action by consenting to the passage of the state statute. Again, as with her initial complaint, Davis requests that this Court issue an opinion regarding the availability of the immunity defense to the Defendants in federal court and an order returning this matter back to the federal court with a conclusion that all tribal court remedies have been exhausted. In the alternative, the amended complaint prays for judgment against the Defendants both for the causes of action recited in her federal complaint and for violations of the Constitution and Bylaws of the Minnesota Chippewa Tribe, see Art. XIII (extending the right of equal protection to all members of the Minnesota Chippewa Tribe *vis a vis* the Executive and Business Committees of each constituent band); 6 MLBSA Sections 6 and 7 (incorporating Article XIII of the Minnesota Chippewa Tribal Constitution into the laws of the Mille Lacs Band); 5 MLBSA 104; 5 MLBSA 102; and finally 1 MLBSA Section 8, which provides that all persons within the territorial jurisdiction of the Mille Lacs Band shall be afforded equal protection under tribal law.[2]

The Defendants have filed a joint motion to dismiss, or in the alternative for more specific pleading, in which they allege that the causes of action proffered by Davis are barred by the sovereign immunity of the Band and its employees. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). They also contend that Davis, insofar as she alleges causes of action arising under Minnesota law, has failed to state tribal claims upon which relief can be granted.

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[2] Although the cause of action under the Civil Rights Code of the Mille Lacs Band Statutes Annotated was not pleaded in Davis' cause of action, this Court permitted her to orally amend her complaint at the hearing on the motion to dismiss primarily because the Defendants had argued the Indian Civil Rights Act, 25 U.S.C. 1301 et seq., in their motion to dismiss and for purposes of judicial economy.

2. Factual assertions

Because this matter is before the Court on the Defendants' motion to dismiss this court must assume as true the factual assertions made in Davis' complaint and attempt to construe those facts in a light most favorable to the Plaintiff[3]. See Weaver v. Clark, 45 F.3d 1253 (8th Cir. 1995). Dismissal at this stage is appropriate only if the Plaintiff can prove no set of facts that would entitle her to relief. See Morton v. Becher, 793 F.2d 185, 187 (8th Cir. 1986). In order for an immunity defense to justify dismissal before meaningful discovery has taken place, the parties asserting immunity must demonstrate on the face of the pleadings that dismissal is appropriate. See Hafley v. Lohman, 90 F.3d 264 (8th Cir. 1996).

Those facts are that Davis, an enrolled member of the Mille Lacs Band, was employed by the Band as a law enforcement officer from December of 1992 until June 28, 1996 when she resigned. Her direct supervisor, Defendant Bankey, is the Chief of Police of the Mille Lacs Tribal Police Department. Defendant Genia is the Solicitor General of the Mille Lacs Band and in that capacity allegedly has supervisory authority over all aspects of tribal law enforcement. Bankey and Genia are enrolled members of other Indian tribes.

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[3] The Court notes that both parties have filed extraneous material with their motions to dismiss including affidavits of the parties involved. Generally, such a filing would convert a motion to dismiss under FRCP 12(b)(6), which this Court will follow as a model, into a motion for summary judgment under FRCP 56. However, for purposes of this motion the Court will ignore those supplemental materials except for legal matters brought before the Court's attention in those affidavits. This Court will also not construe in a manner most favorable to Plaintiff legal assertions made in the pleadings such as the allegation in paragraph 4 of the federal complaint that the Mille Lacs Police Department was created pursuant to Minnesota law.

The complaint alleges that throughout her course of employment with the Band, Davis was subjected to harassment, discrimination and retaliation based upon her sex. Specific acts of discrimination alleged by Davis include: the display of nude photographs in the workplace; the use of sexually demeaning language in the workplace, including Defendant Bankey calling Davis "sweetheart"; Bankey asking Davis to go out for drinks and kissing her on the cheek; an Officer identified as Ligneel cutting off the penis of a deer killed by an auto and offering it to Davis with the proviso that "she needed a little"; Bankey telling Davis that he wanted to come over to Davis' house and celebrate her birthday with her; Bankey denying leave time to Davis for personal reasons while male officers on staff were given leave time for similar requests; Bankey calling Davis a whiner for complaining about discriminatory behavior; and Bankey reprimanding Davis for complaints made by citizens which other officers allegedly committed without being reprimanded and suspended. Furthermore, Davis alleges that after she raised these matters to the attention of the Band, it retained the services of an outside retired Judge who investigated the matter and made recommendations to the Band. The Band's Administrative Policy Board met and reviewed the complaints, but apparently took no action which satisfied Davis.

As the result of her complaints to the Judge and the Board, Davis asserts that Defendants Bankey and Genia took retaliatory action against her by: Bankey filing a complaint with the State Bureau of Criminal Investigation for Davis allegedly sexually assaulting another male employee of the Band; Bankey reprimanding Davis for alleged abuse of the sick leave policy; Bankey and Genia allegedly convincing Officer Pemberton to suspend Davis for one day because she allegedly rolled her eyes at Pemberton while he was talking to her; and being assigned to a new patrol district over one hour

from her home and not being given compensatory time for driving to work while other male officers were given such time.

As the result of the alleged actions of the Defendants, Davis avers that she was forced to resign her position with the police department. She contends that she suffered substantial and ongoing mental anguish and suffering, as well as emotional distress, lost wages and employment benefits and other substantial damages. She asks the Court to either rule that the Defendants are not immune from suit under tribal law and for an order referring this matter back to the federal district court, or in the alternative, award her compensatory damages, punitive damages, and attorney's fees and costs in this court.

B. RELEVANT LAW

At the core of the dispute between the parties over whether Davis' causes of action are barred by sovereign immunity is Minnesota Statute Section 626.90. That statute, enacted in 1991, permits the Mille Lacs Band of Chippewa Indians to exercise certain aspects of law enforcement authority as a municipality in Minnesota, provided four requirements are met. The first requirement, the one at issue here, is that the "band agrees to be subject to liability for its torts and those of its officers, employees, and agents **acting, within the scope of their employment or duties arising out of a law enforcement agency function conferred by this section...** and the band further agrees... to waive its sovereign immunity for purposes of claims of this liability."[4] Minn.

[4] There is nothing in the Mille Lacs Band Statutes corresponding to this state statute, thus the Band has not incorporated any waiver into its internal laws. The Band thus argues, as a secondary contention, that even if the acts complained of here are those for which the state statute purports to waive the Band's immunity, a state statute cannot substitute for a clear

Stat. 626.90, Subd.2(a)(1)(emphasis added). This subdivision is given further context by subdivision seven of the same statute which limits the waiver of immunity to "law enforcement authority only." The emphasized language, according to Davis, is a blanket waiver of immunity subjecting the Band to suits for any tort committed by a tribal officer or employee providing he is acting within the scope of his employment[5] or in the course of any law enforcement function. The Defendants counter with a drastically different interpretation of this language - that it is a waiver of immunity for torts committed by officers or employees only when they were engaged in law enforcement activities specifically conferred by the state statute. The actions complained of here, according to the Defendants, were not taken pursuant to the authority vested in the Band's law enforcement agency by the state statute.

Even should the Court conclude that the Band is not liable for the alleged actions of the individually named Plaintiffs, Davis contends that Bankey and Davis should be held liable both individually and in their official capacities for the wrongs allegedly perpetrated upon her. The basis for this liability, under Davis' argument, is both state statutory prohibitions against sexual discrimination and retaliation and common law admonitions against the negligent infliction of emotional distress and negligent supervision. Davis also contends that the alleged actions of the individual Defendants violate several provisions of the Constitution of the Minnesota Chippewa tribe and Mille Lacs Band statutes extending equal protection to all persons within the

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and express waiver by the Band itself. Although an interesting issue this Court does not feel the need to address it because of the ruling ***infra.***

[5] For purposes of the motion to dismiss the Defendants conceded that the alleged actions were taken, in the course of Bankey and Genia's employment.

jurisdiction of the Mille Lacs Band. See 1 MLBSA Section 8. The Defendants respond by contending that the individual defendants, as tribal employees, can cloak themselves in the immunity of the tribe and can only be held liable if their actions were taken "with malicious intent and in bad faith." 24 MLBSA 701(a). Additionally, Genia contends that the Solicitor General of the Tribe is absolutely immune for his actions "arising from the true and faithful performance of his/her lawful acts and deeds in the Court of Central Jurisdiction or any other court of competent jurisdiction." 4 MLBSA 21. Finally, the Defendants contend that even if they are not immune from this suit under the common-law immunity of the Band, they should have qualified immunity because they did not violate clearly established law when they allegedly took the actions that they did. See Harlow v. Fitzgerald, 457 U.S. 800,818 (1982).

Although not promoted as an argument by Davis, this Court also is compelled to address the effect of Public Law 280 on the issues before the Court. That statute, enacted in the 1950's to address a perceived need to provide for inadequate law enforcement in Indian country, gave criminal and civil jurisdiction over Indian country, as the term is defined at 18 U.S.C. 1151, to certain states (mandatory states) and allowed other states (optional states) to exercise jurisdiction if certain prerequisites were met.[6] Minnesota, with the exception of the Red Lake Indian reservation, is a mandatory state, thus the state courts of Minnesota were given criminal and civil jurisdiction over causes of action arising within Indian country, with certain exceptions. As discussed infra, this Court does not believe that Public Law 280 impacts this case, insofar as it does not operate as a waiver of a

[6] Public Law 280 has been amended since its enactment to now require that a Tribe agree to a state's extension of its jurisdiction to Indian country before further jurisdictional incursions can occur. See 25 U.S.C. 1322.

Tribe's sovereign immunity, see Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d 883,887 (Minn. 1986) nor does it compel a tribal court, nor state court, to apply state law regulating the tribal employer-employee relationship in a purely internal tribal dispute. See Bryan v. Itasca County, 426 U.S. 373 (1976); California v. Cabazon Band of Mission Indians, 480 U.S. 202(1987). Tribal courts retain the jurisdiction to entertain civil causes of action arising within Indian country, notwithstanding the enactment of Public Law 280,[7] and retain the inherent authority to enact their own laws and to be governed by them even when they conflict with state laws.

C. LEGAL ANALYSIS

The Band has been named as a Defendant for all the causes of action averred by the Plaintiff in her amended complaint, with the possible exception of one.[8] This court must therefore determine whether the Band's common law immunity from suit and its immunity under tribal law, see 2 MLBSA 5(a)[9], has either been waived by the tribe or somehow abrogated by the Minnesota statutes and common-law doctrines relied upon by the Plaintiff. In addition, the Court must determine whether the tribal causes of action for

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[7] This court exercises broad jurisdictional authority over activities that occur within the Mille Lacs reservation even though the parties acknowledged at the hearing that the state has not retroceded jurisdiction to the United States government under Publ. Law 280, as amended.

[8] At oral argument, Davis conceded that the cause of action for conspiracy under 42 U.S.C. 1985 does not lie against the Band, but only the individually named Defendants.

[9] That section provides in relevant part that "the Non-Removable Mille Lacs Bands of Chippewa Indians shall not be subject to suit in any court of competent jurisdiction without its express written consent to such suit."

monetary damages[10] asserted by Davis waive the sovereign immunity of the Band. Lastly, the Court must determine to what extent the individually named Defendants can avail themselves of the sovereign immunity defense against allegations that they violated state law and tribal civil rights laws, as well as practices proscribed by federal statutes.

1. *Sovereign Immunity*

It is now a well-settled axiom of federal law that Indian tribes, like state and federal governments, are sovereign entities that cannot be sued absent their consent or an unambiguous abrogation of their immunity. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Tamiami Partners v. Miccosukee Tribe, 63 F.3d 1030 (11th Cir. 1995); Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991). Not only have the federal courts acknowledged this immunity, but the state courts of Minnesota, see Gayle v. Little Six, Inc., 534 N.W.2d 280,286 (Minn. Ct. App. 1995); Cohen v. Little Six, Inc., 543 N.W.2d 376 (Minn. App. 1996),[11] as well as tribal courts of Indian nations throughout the country have accepted this reality. See Clement v. LeCompte, 22 ILR 6111 (Cheyenne River Supreme Court, 1994); GNS, Inc., et al v. Winnebago Tribe

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[10] Because this action does not involve any request for declaratory relief the Court will restrain from addressing any issue regarding the extent that the immunity defense is available to a tribe in an action for declaratory or equitable relief. *See e.g., Northern States Power Co. v. Prairie Island Mdewekanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993)(Tribe not immune from suit alleging that tribe acted outside its authority by enacting nuclear radiation control ordinance).*

[11] The Cohen decision contains a startling dissent by Justice Randall, criticizing the doctrine of tribal sovereign immunity and calling it "red apartheid." Randall apparently had a change of heart after that dissent as he swore in the new chairman of the White Earth Band of Chippewa Indians after its recent election.

of Nebraska, 21 ILR 6104 (Winnebago Tribal Court, 1994); Raymond v. Navajo Agricultural Products Industry, 22 ILR 6100 (Nav. Supreme Court 1995) An Indian tribe is generally immune from any type of suit, including suits for money damages, as well as equitable and injunctive relief. Duncan Energy v. Three Affiliated Tribes of the Fort Berthold Reservation, 812 F.Supp. 1008,1011 (D.N.D. 1992), reversed on other grounds, 27 F.3d 1294 (8th Cir. 1994).

Even if it is demonstrated that tribal officials exceeded their authority, the Tribe itself cannot be sued for money damages. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269 (9th Cir. 1991); Oklahoma Tax Commission, supra. The United States Court of Appeals for the Eighth Circuit has recognized an exception to this principle when a tribe has exceeded its authority to promulgate legislation and is being sued for injunctive relief, but this exception is inapposite in this case as the case at bar involves claims for monetary relief. See Northern States Power Co., supra

Tribal officials are similarly cloaked with sovereign immunity provided the actions they took were within the official scope of their duties. See Baker Electric Coop, Inc. v. Chaske, 28 F.3d 1466 (8th Cir. 1994); Burlington Northern Railroad Co. v. Blackfeet Tribe, 924 F.2d 899. The federal and tribal courts have recognized an exception to this immunity, however, when tribal officials or employees exceed the scope of their authority and violate the rights of individuals. See South Dakota v. Bourland, 113 S.Ct. 2309 (1993)(tribal chairperson not immune from suit for equitable relief alleging that he exceeded his authority by attempting to regulate non-Indian hunting and fishing on taken lands within reservation boundaries); Baker Electric, supra; Northern States Power, supra, This doctrine, first identified in the non-tribal context in Ex parte Young, 206 U.S. 123 (1908), permits suits against tribal officials in their individual

capacities for actions taken outside the normal scope of their authorities. It was first recognized in the tribal court context in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69 (1978), wherein the Court noted that even though the Indian Civil Rights Act, 25 U.S.C. 1301 et seq., did not waive the sovereign immunity of the tribe in a suit for declaratory relief in federal court, tribal court remedies may be available against individually-named tribal officials or employees in tribal court for violations of the ICRA. Various tribal courts have determined that tribal officials or employees who violate the Indian Civil Rights Act are liable in their individual capacities for their transgressions. See Bordeaux v. Wilkinson et al., 21 ILR 6131 (Tr. Ct of Three Aff. Trbs. Oct. 1, 1993)(tribal officials not immune from suit in challenge to authority of council to award themselves bonuses); Stone v. Swan, 19 ILR 6093 (Colv. Tr. Ct. 1992); Satiacum v. Sterud et al., 10 ILR 6013 (Puy. Tr. Ct 1982); Brown v. Wounded Knee School District, Oglala Sioux Supreme Court (April, 1996).

This general Principle permitting suits against individual tribal representatives or employees must be read in *pari materia* with any Mille Lacs Band statute that governs suits against tribal officials or employees because it is this court's obligation to first and foremost uphold the laws of the Mille Lacs Band. 24 MLBSA 701(a) precludes suits against Band officials and employees "for actions taken in the course of their official duties; unless, in the case of a Band employee who does not hold elected office[12], it is established that such action was taken with malicious intent and in bad faith." This is actually a heightened version of the Ex Parte Young standard with a requirement that not only must a party demonstrate that a tribal employee or official acted outside the scope of his/her official duties, but that said actions were taken maliciously and in bad faith. Actions taken negligently

[12] Neither Bankey nor Genia are elected officials.

or because of omission do not appear to be encompassed under the limited waiver provided by 24 MLBSA 701(a).

The courts have recognized numerous manners by which the sovereign immunity of a tribe can be waived or abrogated. A tribe can waive its immunity, but that waiver must be clearly and unambiguously expressed and waiver will not be inferred. See Rosebud Sioux Tribe v. Val-U Construction Company, 50 F.3d 560 (8th Cir. 1995)(Tribe, by consenting to arbitration, waived its immunity from suit), contra, Calvello v. YST, 899 F.Supp. 431 (D.S.D. 1995); Rupp v. Omaha Tribe, 45 F.3d 1241 (8th Cir. 1995(Tribe waived immunity as to any claim to land by filing quiet title action regarding same land); Dacotah Properties v. Prairie Island Indian Community, 520 N.W.2d 167,170 (Minn. Ct. App. 1994)(Tribe, by engaging in commercial enterprises with non-Indian entities under a corporate charter permitting it to sue and be sued, waived its immunity from suit); Conklin v. Freemen, 20 ILR 6037 (N. Plns. Intertr. Ct. Of Appls. 1993)(Tribe waived its immunity from suit for declaratory relief by adopting IRA constitution allowing itself to be sued).

In addition, the sovereign immunity of an Indian tribe is subject to the plenary authority of the federal government to abrogate that immunity, but any abrogation must be clearly and unequivocally expressed. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982). States cannot unilaterally abrogate the sovereign immunity of Indian tribes by promulgating legislation waiving that immunity. See Bryan v. Itasca County, 426 U.S. 373 (1976). This is true even under Public Law 280, see 28 U.S.C. 1360, as amended 25 U.S.C. 1322. It is now well-settled that Public Law 280 did not effect a waiver of the sovereign immunity of Indian tribes in states where Public Law 280 vested state courts with jurisdiction. See Maynard v. Narragansett Indian Tribe, 984 F.2d 14, 16 (1st Cir. 1993); Seminole Tribe of Florida v. Houghtaling, 589 So.2d 1030 (Fla. Dist. Ct. App. 1991);

California v. Quechan Tribe of Indians, 595 F.2d 1153 (9th Cir. 1979).

The case at bar presents an intriguing immunity question, with a mixture of an alleged consent to suit by the band, combined with a state statute purportedly waiving the Band's sovereign immunity for torts committed by law enforcement officials in the course of their employment or in the exercise of law enforcement activities conferred by Minn. Stat. 626.90. Davis contends that the Band's consent to the passage of this statute, coupled with its filing of a certificate of insurance[13] covering such torts, has effected a waiver of the Band's immunity from the causes of action alleged by her. The Band and its employees counter by asserting that the actions being attributed to the individually named Defendants, although torts, are not the type of torts 626.90 was intended to cover. This Court does not see the need to resolve the more complex issue - whether a state statute can abrogate tribal sovereign immunity by the passage of legislation actively supported by the Band which confers additional authority on the Band's law enforcement - because this case can be resolved solely on the waiver issue.

Davis asks this Court first to rule that Minn. Stat. 626.90 waives the Band's sovereign immunity from suit in federal court and for an order returning this matter to the federal court with a declaration that tribal remedies have been exhausted. This request is rejected as it fails to state a cause of action upon which relief can be granted and represents a contorted viewpoint of the function served by the tribal court exhaustion rule. This matter is not before the Court on a certified question from District Court Judge Alsop on a legal issue of tribal law properly presented to the federal court, but instead

[13] The Court does not believe the fact that the Band may have insurance to indemnify itself against Plaintiff's claims has any relevance to the issue of sovereign immunity.

is the result of a stay issued by Judge Alsop to permit Davis to exhaust her tribal court remedies. If "exhaustion" meant that a tribal court should issue rulings on tribal law in a vacuum, without the proper context of an active case or controversy, tribal courts would cease to be available forums for the resolution of disputes and instead would become "think tanks" on esoteric issues of tribal law for federal and state courts. This would not result in the strengthening of tribal justice systems, something clearly envisioned by the exhaustion decisions issued by the federal courts, see Bruce Lien, Inc., v. Three Affiliated Tribes of the Fort Berthold Reservation, supra; National Farmer' Union Insurance v. Crow Tribe of Indians, supra; Duncan Energy v. Three Affiliated Tribes of the Fort Berthold Reservation, supra.

Although the Mille Lacs Band Statutes do contain provisions for the certification of tribal law questions from foreign courts, see 24 MLBSA 3001, that process is only available when the requesting court has jurisdiction over a cause of action pending before it and the certified question may assist that requesting court in determining a cause before it. In this case, Judge Alsop has already ruled that federal court jurisdiction cannot be invoked until Davis has exhausted her tribal court remedies. For the reasons explained, infra, this Court believes there are tribal court remedies for Davis. Therefore, Davis' complaint, insofar as it prays for a determination by this Court that Minn. Stat. 626.90 waives the sovereign immunity of the Band in the federal action now stayed and that all tribal remedies have been exhausted, is dismissed.

This does not resolve the contested immunity issue before the Court, however, because Davis asks that this Court rule that the Band has waived its immunity from suit for the federal, state and tribal causes of action asserted in tribal court. If indeed the Band has waived its immunity from suit for the causes of action, this Court would have jurisdiction

over the causes of action alleged in Davis's complaint, assuming of course that they are viable causes of action. Tribal courts are available forums for the resolution of disputes based on tribal, federal or even state law. See Billie, et al. v. Abbott, 16 ILR 6021 (Nav. Supreme Court 1991)(court holds that Navajo courts have jurisdiction over civil rights action brought against state official for illegal intercept of tax refund); Nevada v. Hicks, No CV-N-94-351-DWH(W.D. Nev. 1994)(suit to enjoin tribal court jurisdiction over 42 U.S.C. 1983 action against state game warden in tribal court); United States v. Plain Bull, 947 F.2d 724 (9th Cir. 1992)(United States government must utilize tribal court to evict trespasser from federal lands even though federal statute permits US to sue in federal court). The Mille Lacs Band Statutes also recognize the authority of this court to apply state or federal law, when appropriate, when the application of such law does not conflict with the customs and traditions of the Band.[14] See, e.g., 24 MLBSA 2007(allowing this Court to apply the pertinent laws of the United States, or lacking federal law, state law of Minnesota to disputes arising in tribal court); 24 MLBSA 6 (incorporating the consumer protection laws of Minnesota into tribal law);

Every cause of action cited by Davis in her tribal court complaint, except 42 U.S.C. 1985, is pleaded against the Band as well as the individually-named Defendants. To survive the Band's motion to dismiss, Davis must show that the Band has waived its sovereign immunity or somehow that immunity has been abrogated for purposes of the separate causes of action. This court has already held that Public Law 280 does not abrogate that immunity, nor does Davis cite to any federal law to support the proposition that immunity has

[14] When tribal law speaks clearly to a subject, however, such as sovereign immunity this Court need not determine whether sovereign immunity is a concept consistent with the traditions and practices of the Band because the Band Assembly has clearly spoken in this area.

been abrogated here. Her sole argument is that Minnesota Statute 626.90 is an explicit waiver of that immunity. This court now turns its attention to this contention.

In interpreting the import of the state statute at issue here, this Court is mindful of the directive of the Court of Appeals for the Court of Central Jurisdiction for the Non-Removable Mille Lacs Band which in In the Matter of the Opinion of the Solicitor General, 15-OSG-92, 92-CV-5358, held that the "meaning of a statute must first be sought in the language of the statute itself." Id., at 6. Only if the clear intent of the legislation would be defeated by a literal interpretation of the language should a court strain to find another interpretation to implement the statutory intent. This "plain meaning rule" is further tempered by the requirement that a waiver of tribal sovereign immunity must be clearly and unequivocally expressed in the legislation itself, and cannot be inferred. See Santa Clara Pueblo, supra.

The pertinent statute, at subdivision 2(a)(1) states that the "band agrees to be subject to liability for its torts and those of its officers, employees and agents **acting within the scope of their employment or duties arising out of a law enforcement function conferred by this section..."**(emphasis added). The legislative history to this statute makes it clear that the purpose of the entire statute was to authorize Mille Lacs Band law enforcement officers to exercise concurrent arrest authority, with state and county law enforcement, over all persons who commit state criminal violations on trust lands and over all Minnesota Chippewa tribal members, and others who commit criminal offenses in the presence of tribal officers, within the Band's original territorial boundaries as established by the February 22, 1855 treaty. The law enforcement function therefore conferred upon tribal law enforcement by this section is the expanded authority over non-Indians who commit criminal offenses on trust land and members of the Minnesota Chippewa tribe, and

non-members who commit criminal offenses in the presence of tribal law enforcement, within the original exterior boundaries. It is beyond peradventure that the alleged wrongs committed by the individual Defendants in this lawsuit did not arise out of the performance of law enforcement functions conferred by this statute, but instead were the result of the Band exercising its inherent authority to protect its members by operating a law enforcement department.[15]

The language of the statute is ambiguous however with regard to whether "arising out of a law enforcement function conferred by this section" is language qualifying "employment or duties" or merely "duties." If it is the latter it appears that the torts that allegedly occurred here clearly arose out of the Defendants performing within the scope of their respective employments.[16] The Court rejects that interpretation, however, because it is inconsistent with the legislative history and with the requirement that a waiver of immunity be both clear and unequivocal. Under such an interpretation, the Band, by taking the steps of exercising the additional arrest and investigative jurisdiction vested in it by the state statute, has waived its immunity with regard to all aspects of its law enforcement operation and not just those additional functions authorized by the statute.

It is clear from the legislative history that in exchange for the additional authority granted the Band, the Band was agreeing to be liable for torts committed by its employees in the course of performing those additional duties. This conclusion is reinforced by subdivision 7 of the statute, which limits the impact of the entire statute, including the agreement to be liable for torts, to law enforcement authority only. This interpretation does not render the waiver meaningless as the

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[15] Indeed, the Mille Lacs police department predated the enactment of this state statute.

[16] This was conceded by the Defendants at oral argument.

Band may be potentially liable for any torts committed by its officers or employees in the course of exercising authority under the statute.[17] However, the authority being exercised in the case at bar when the alleged torts occurred harming Davis was within the inherent sovereign authority of the Band to maintain a law enforcement agency. This Court believes that the language in the statute restricting the waiver to torts arising out of the performance of activities authorized by the statute refers both to duties and employment.

Because of this determination, and Davis' failure to point to any other statute abrogating the Band's sovereign immunity, all claims against the Band are barred by sovereign immunity and must be dismissed.

2. *Immunity of Individual Defendants*

Having determined that the Band is immune from all causes of action recited by Davis, this Court now turns its attention to the motions to dismiss filed by Bankey and Genia. They are shielded by the immunity of the Band, except for those causes of action which allege that they acted with "malicious intent and in bad faith." 24 MLBSA Section 701. Initially, it should be noted that Genia argues that he has absolute immunity under the provisions of 4 MLBSA Section 20, which provides in relevant part that he is immune from any suit for civil liability "arising from the true and faithful performance of his lawful acts and deeds...". Genia argues that this statute of specific applicability takes precedence over 24 MLBSA 701, a statute of general applicability.[18] This

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[17] Because of this Court's ruling it need not decide that issue here as it is not presented by the facts of this case.

[18] 24 MLBSA 701 cross-references 4 MLBSA 21, although it is unclear whether the Band Assembly or West Publishing made the connection between the two statutes.

Court agrees that 4 MLBSA 20 controls on the question of Genia's liability, but disagrees with Genia's contention that this statute makes him absolutely immune from suit. Just as with any non-elected employee of the Band, Genia is liable for any action taken with malicious intent and bad faith, as this standard is not inconsistent with 4 MLBSA 20 which clearly does not extend immunity to all his activities, but only those taken in the true and faithful performance of his duties.

The difficulty with assessing the availability of the immunity defense for Genia is that both the federal complaint, which is incorporated into the tribal complaint by reference, and the amended tribal complaint, are somewhat lacking in specific allegations against Genia. Paragraph 7 of the amended complaint alleges that Davis complained to Genia about her treatment at the hands of Bankey and other officers and that he failed to take appropriate corrective action. Paragraph 9 of the federal complaint alleges that Genia was Bankey and Sergeant Pemberton's supervisor and "knew of, tolerated and participated' in discrimination and retaliatory harassment of Davis. Paragraph 11 of the federal complaint alleges, inter alia, that Genia threatened Davis with further discipline for filing complaints against Bankey. Paragraph 11(c) alleges that Genia met with Bankey and Pemberton and as the result of said meeting Davis was suspended for one day.

Davis clearly pleads most of her factual averments against Genia and the Band under the theory that an employer who is aware of sexual harassment but who takes no action to abate the harassment, is liable, a theory which is widely accepted in the federal courts. See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). This theory places liability upon an employer for allowing sexual harassment and discrimination to occur in the workplace if no action is taken by the employer to abate the harassment. Although placing this type of liability upon an employer is necessary to protect

employees in the work place, it is at odds with the Band's statutes on liability of tribal employees which requires a showing of malicious intent and bad faith. The mere failure to act to abate harassment does not rise to the level of "malicious intent" as required by Band statutes. Genia cannot therefore be held liable in his official capacity as Solicitor General or in his individual capacity for actions taken by others, unless he either directed said actions or participated in them.

Having determined that, this Court is not willing to rule that Genia is absolutely immune from suit in a case such as this. There are certain allegations made against Genia in the complaint which, if more specifically pleaded, could be determined by a fact finder to be taken with malicious intent and in bad faith. As Davis correctly observes in her brief, issues of discrimination and harassment are inherently factual issues and at this juncture in this case the facts must be construed in a light most favorable to Davis. The motion to dismiss Genia from this action on the basis of sovereign immunity shall be denied at this time. The Court will address later whether Davis has stated causes of action against Genia under the theories asserted in her complaint.

Similarly, there are allegations against Bankey which, if true, could subject him to liability under the malicious intent and bad faith standard dictated by the Band Assembly. Throughout the complaint Davis asserts that Bankey took actions against her because of her sex and that he intentionally took retaliatory steps against her when she complained. Bankey's motion to dismiss on the ground of sovereign immunity is also denied.

3. *Qualified Immunity*

Even if a governmental official is not absolutely immune from suit, he may still be immune if his actions do not violate

clearly established statutory or constitutional rights. See Mitchell v. Forsyth, 472 U.S. 511 (1985); Arcoren v. Peters, 829 F.2d 871 (8th Cir. 1987) (en banc). There is not reason this type of defense should not be available to tribal employees who perform governmental functions similar to state and federal officials. Police officials have routinely availed themselves of the qualified immunity defense.

The individual Defendants argue that they cannot be liable under 42 U.S.C. 1983 because it is not "clearly established" that tribal officials can be held liable under that statute, nor that the federal equal protection clause of the fourteenth amendment to the United States Constitution applies to tribal officials. This argument has much merit, especially in light of this Court's previous holding that the actions complained of here were not taken pursuant to a grant of authority under Minnesota Statute 626.90. Indeed, if that federal statute were the sole cause of action asserted by Davis, the Court would be compelled to agree. However, Davis cites to both Band Assembly statutes, 1 MLBSA Section 8 and 6 MLBSA Section 7, and provisions in the Minnesota Chippewa Constitution, Article XIII, which arguably proscribe the types of activities she alleges in her complaint. There can be no doubt that these provisions apply to the Band and its employees, although the question of what remedies may be available under those statutes is not resolved. It is also telling that the Band Assembly specifically contemplated that non-elected tribal officials may be held liable for their actions taken with malicious intent and in bad faith by allowing suits against tribal employees in this Court. Because of the Court's ruling on the viability of the 42 U.S.C. 1983 claim against the Defendants, infra, the Court sees no need to address the availability of a qualified immunity defense to that cause of action. However, for those causes of action alleging violations of the Band's Civil Rights Code and the Minnesota

Chippewa Constitution, the Defendants are not entitled to qualified immunity.

4. *Statute of Limitations Defense*

The Defendants also assert that Davis' causes of action are barred by the relevant one year statute of limitations under tribal law. See 24 MLBSA Section 2014. This argument is rejected as it is clear from the Complaint that Davis is alleging that the Defendants engaged in a course of conduct, culminating in her "forced resignation" in June of 1996. Under those circumstances, the law is well-established that the statute of limitations begins to run from the last documented incident of a violation, which in this case is actually while this action was pending in tribal court. See, e.g., Bougie v. Sibley Manor, 504 N.W.2d 493 (Minn. App. 1993).

5. *Failure to State* Claims Upon Which *Relief Can Be Granted*

As a last basis for dismissal, the Defendants assert that all the complaints alleged in Davis' complaint fail to state either federal or tribal claims upon which relief can be granted and thus all causes of action should be dismissed. This Court has already dismissed all actions against the Band, thus it will not discuss any of the causes of action asserted against the Band, but only those asserted against the individual Defendants.

a. 1983 Action

To state a cause of action under 42 U.S.C. 1983 a Plaintiff must demonstrate that a person, including a municipality, acting under the color of state law violated rights preserved under either the federal constitution or

federal statutes. See Parratt v. Taylor, 451 U.S. 527 (1981); Howe v. Ellenbecker, 8 F.3d 1258 (8th Cir. 1993). In this case, Davis asserts that the Defendants were acting under the color of Minnesota law, specifically Minn. Stat. 626.90, and that they violated her rights to equal protection under the law guaranteed her by the 14th Amendment to the United States Constitution. However, this Court has already ruled that the Defendants in this case were acting within the inherent sovereign rights of the Mille Lacs Band when they took the alleged actions which form the gravamen of Davis' complaint, and not Minnesota law. They were not engaged in any law enforcement function given them by the state statute. In addition, the alleged rights violated here are created under tribal law and any state or federal right incorporated into the tribal civil rights protections. See Warn v. Eastern Band of Cherokee Indians, 858 F.Supp. 524 (W.D. N.C. 1994)(Tribal official acting pursuant to tribal law not a state actor for 1983 jurisdiction). They are not the product of the federal constitution, nor of any federal statute.[19] For these reasons the causes of action alleged under 42 U.S.C. 1983 against both Genia and Bankey shall be dismissed.

b. Fourteenth Amendment Claim

The federal constitution does not regulate the relations between Indian tribes and tribal members because Indian tribes are sovereign entities not subject to the restrictions of the United States Constitution. See United States v. Wheeler, 435 U.S. 313 (1978). This does not mean that Indian tribes can mistreat persons with impunity as most Tribes have enacted their own laws preserving to individuals civil rights

[19] Even though the Indian Civil Rights Act, 25 U.S.C. 1902 et seq., is clearly a federal statute, it cannot be enforced in federal court through a 42 U.S.C. 1983 action, but only through a habeas corpus application. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

similar in many respects to the federal constitution. This is true with regard to the Mille Lacs Band which has adopted a Civil Rights Code as Title I of its Statutes. Enacting provisions similar in form to the United States Constitution does not open the Tribe or tribal employees open to liability under those federal claims. Because the fourteenth amendment to the United States Constitution did not apply to the Defendants when they were regulating Davis' employment with the Band, this Court does not believe a cause of action can be alleged against the Defendants under the fourteenth amendment's equal protection clause.[20]

c. Minnesota common-law claims for negligent retention and infliction of emotional distress

Davis contends that Genia was negligent in the supervision of police staff, especially Bankey, and that said negligence caused her harm. She also alleges that both parties negligently inflicted mental suffering and anguish upon her by their actions. This Court notes that similar causes of action are not explicitly provided for in the Mille Lacs Band Statutes; however, the statutes do permit this Court to incorporate state causes of action provided they do not conflict with the "unwritten customs and traditions of the Band since time immemorial." 24 MLBSA Section 2007(a). The Defendants argue that the recognition of these causes of action would be in conflict with the traditions and customs of the Band and that therefore they should be dismissed. The Court does not agree, but instead believes that they cannot be pursued against the Defendants because the basis for liability

[20] The Court offers no opinion on whether the Defendants, when engaging in powers vested in them by Minnesota law, are acting under the color of state law or must abide by the federal and Minnesota constitution as that issue is not presented by this case.

under them are inconsistent with the required standard to waive the Defendants' immunity.

To pursue a cause of action for wrongful hiring and retention against Genia, Davis must demonstrate that Genia "knew or should have known that the employee was violent or aggressive and might engage in injurious conduct." Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. App. 1993)(citations omitted). Assuming, arguendo, that Genia was the employer and Bankey and others were the employees, the basis for liability under this Minnesota common-law tort is the failure of an employer to act when information comes to his attention that an employee is prone to commit acts of harassment against another employee or the failure to properly investigate an employee when hired.[21] In other words, Davis need not demonstrate a willful and malicious act by Genia, but only that he failed to take action when it was called for. It appears that under 24 MLBSA Section 701 Genia and Bankey, assuming this cause of action is asserted against him for failure to supervise the other officers mentioned in the federal complaint, are immune from suit because that Band statute does not permit causes of action to be pursued against tribal employees for negligent actions, but only willful and malicious ones.

The same flaw exists in Davis' cause of action for negligent infliction of emotional distress. To state a cause of action for that tort a Plaintiff has to demonstrate that the acts of a Defendant negligently caused some mental anguish accompanied by physical injuries[22] and that the Defendant should have foreseen that the Plaintiff was within the zone of danger of those that could be potentially harmed. See Stadler

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[21] It appears that Genia may not have even been the Solicitor General when Bankey was hired.

[22] It does not appear from the complaint that Davis alleges she suffered any direct physical injury.

v. Cross, 295 N.W.2d 552,553 (Minn. 1980); see also Dornfield v. Olberg, 503 N.W.2d 115 (Minn. 1993) (this case contains a thorough comparison between the torts of intentional infliction of emotional distress and negligent infliction of emotional distress.) The Mille Lacs Band Assembly has made a policy decision to permit suits against tribal employees only for willful and malicious torts that they commit during the course of their employment, except for torts that occur in the exercise of the additional powers vested them by Minn. Stat. Section 626.90. Although this scheme may seem to permit non-tribal members more recovery rights than tribal members such as Davis, it is a policy choice best left to the Band Assembly and not to this Court. The tort of negligent infliction of emotional distress is not a willful and malicious tort and thus the cause of action asserted against Genia and Bankey alleging this tort is dismissed.

d. Cause of action under 42 U.S.C. Section 1985

Davis asserts that the Defendants conspired to deprive her of her rights to equal protection under the law protected by the federal constitution, the Indian Civil Rights Act and tribal constitutional and statutory commands. She therefore asks that this court exercise jurisdiction under 42 U.S.C. 1985(3) which prohibits private conspiracies "motivated by an invidiously discriminatory animus towards a (class).." Griffin v. Breckenridge, 403 U.S. 88(1971). In this case she alleges that she was denied equal protection of the law by the Defendants because of her status as a woman.

This cause of action presents some difficulties, some of which Davis can overcome, but one which dooms her alleged cause of action under the federal statute. First, 42 U.S.C. 1985 does not serve to abrogate the sovereign immunity of the Band, see Indian Political Action Committee v. Tribal Execute Committee, 416 F.Supp. 655 (D.Minn. 1976), thus

the cause of action alleged against the Band for a conspiracy is dismissed. However, the federal courts have long recognized that jurisdiction may lie when private tribal members conspire to deprive other tribal members of rights guaranteed under either the federal or tribal constitutions. See Means v. Wilson, 522 F.2d 833 (8th Cir. 1975)(conspiracy to deny tribal members the right to vote, guaranteed them under tribal law, is actionable in federal court under 1985). Means was decided prior to the United States Supreme Court's decision in Santa Clara Pueblo v. Martinez, supra, restricting access to the federal court to those persons allegedly aggrieved by tribal governments. Since Santa Clara the majority of federal courts have been hostile to the notion that 1985 can be utilized as a way of circumventing the holding in Santa Clara by alleging a conspiracy to violate civil rights by tribal officials. See, e.g., Montgomery v. Flandreau Santee Sioux Tribe, 905 F.Supp. 740 (D.S.D. 1995)(Section 1985 jurisdiction does not lie to remedy an alleged violation of the Indian Civil Rights Act in federal court).

However, in this case, the Plaintiff is asserting her federal cause of action in tribal court, something clearly contemplated by Santa Clara and countenanced by the federal courts as a manner of strengthening tribal sovereignty and promoting tribal court adjudicatory power. See United States v. Plainbull, supra. The Mille Lacs Band Statutes expressly provide that this Court is to apply any pertinent laws of the United States should the Band lack any written law on the subject. 24 MLBSA Section 2007(a). Nothing prevents this Court from exercising jurisdiction over a cause of action predicated upon federal law. Means seems to acknowledge that even if the nature of the right being denied is a tribal right, rather than a federal one, 1985 jurisdiction may lie. Therefore, even if, as this Court has previously held, the Defendants did not violate any rights guaranteed Davis by the

federal constitution she can proceed with a conspiracy theory if she can point to a right assured her under tribal law.

Nor is this Court persuaded by the argument interposed by the Defendants that Davis has failed to plead with sufficient particularity the nature of the conspiracy in this case. Admittedly, Davis' pleading was particularly designated to persuade a federal court, and has merely been copied and submitted to this Court. However, at several points in the complaint she asserts that Defendants Genia and Bankey took action in concert to either silence her complaints or to punish her for complaining about her alleged mistreatment at the hands of her supervisors. In Means the Court noted that even one isolated allegation of collusion should suffice to survive a motion to dismiss a conspiracy allegation under 1985. Davis has therefore sufficiently pleaded with particularity a "conspiracy."

The flaw in Davis' theory, however, is pointed out the by the Court in Runs After v. United States, 766 F.2d 347 (8th Cir. 1985) wherein tribal members who were denied the right to run for elective office sued under several theories, including 42 U.S.C. 1985, to solicit federal court intervention in their plight. Their theory there was the same as Davis' here - that tribal officials are conspiring together to deny a right protected under tribal law. The Runs After court held that a tribe cannot conspire with itself to violate a person's rights, but instead there must be a conspiracy with another entity or person, other than the tribe, to satisfy the requirements of 1985. Means was distinguished on the ground that the tribal chairman there was conspiring with non-tribal officials to deny the right to vote to certain tribal members. In the case at bar, the bare allegations are that Genia and Bankey, as well as other members of the Band's police force, conspired to deny Davis equal protection of the law.[23] The Band's police force

[23] There is reference to Bankey sending a complaint against Davis to the Minnesota Bureau of Criminal Investigation as a means of retaliating

cannot conspire with itself, under the logic of Runs After, and constitute a cause of action under 42 U.S.C. 1985. The Plaintiffs cause of action under 42 U.S.C. Section 1985 is therefore dismissed against all the Defendants.

e. Minnesota Human Rights Act and Whistle-Blower Statute

The last non-tribal causes of action invoked by Davis involve alleged violations of the Minnesota Human Rights Act and the Whistle-Blower Statute. As this Court indicated before, it is permitted to allow causes of action in this Court based upon state law in the absence of any Band law on the subject and when applying state law will not conflict with the unwritten customs and traditions of the Band. 24 MLBSA Section 2007(a). The Minnesota Human Rights Act is apparently similar to Title VII of the 1964 Civil Rights Act in that it prohibits discrimination based upon race, sex, religion and other immutable characteristics which have nothing to do with one's ability to perform a job. The creation and toleration of a sexually hostile workplace is cognizable under both Title VII and the Minnesota Human Rights Act. See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). This Court can therefore apply this state law unless the Tribe already has laws which proscribe this type of activity.

The Court will dismiss the cause of action based upon the Minnesota Human Rights Act because the Mille Lacs band already prohibits the type of activities Davis alleges against both Genia and Bankey, thus that Act is duplicative of already existing tribal law. Both the Mille Lacs Civil Rights Code, at 1MLBSA Section 8, and the revised Constitution and Bylaws of the Minnesota Chippewa Tribe, incorporated into Mille

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against her, but no assertion is made that the Bureau was conspiring with Bankey to deny Davis any rights.

Lacs Band law, at Article XIII, prohibit discrimination based upon sex and afford all persons the equal protection of the laws *vis a vis* tribal officials and government. This Court need not apply state law when the Band Assembly and the Anishinabe people have already proscribed certain conduct.

The same can be said for the cause of action cited under the Minnesota Whistle-Blower statute. It is true that the Mille Lacs Statutes do not contain an explicit ban on retaliation against persons who in good faith complain about sexual harassment. However, the federal courts have recognized that retaliation against a person who complains of unlawful activity is part and parcel of that unlawful activity and is independently cognizable under a discrimination theory. See Archeluta v. Colorado Dept. of Institutions, 936 F.2d 483 (10th Cir. 1991)(retaliation claim can be pursued under Title VII despite other claims of sexual discrimination not being properly filed with EEOC). Because the cause of action under the Whistle-Blower statute addresses activity which is already proscribed by tribal law this Court dismisses the cause of action alleged under Minnesota law.[24]

Although Davis does not argue the impact of Public Law 280 on the application of state law to this cause of action, this Court feels compelled to once again reiterate that Public Law 280 does not require the application of state regulatory laws to tribal employers, see Tibbetts supra (holding that state worker's compensation laws do not apply to tribal employers through the force of Public Law 280). This Court must apply the laws of the Band when adjudicating this particular dispute.

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[24] Similarly, insofar as the Complaint alleges a constructive discharge, this Court feels that said cause of action is inextricably tied into the tribal causes of action for violation of equal protection and the question of whether Davis was forced to resign because of her sex goes to the issue of damages for violation of equal protection. Additionally, Davis was employed by the Band and this Court has already held that the Band is immune from all actions asserted by her.

6. The Causes of Action Premised Upon Band Law

The Court will deny the motion to dismiss filed by Bankey alleging that he violated Davis' right to equal protection under the law in contravention of the Band's civil rights code, 1 MLBSA Section 8 and Article XIII of the revised Constitution of the Minnesota Chippewa Tribe, by allegedly sexually harassing her, treating her disfavorably based upon her sex, retaliating against her when she complained, and forcing her to resign. As this Court has already held, tribal officials can be held liable for their activities when they are taken with malicious intent and in bad faith. This is also consistent with the prevailing school of thought in most tribal courts that tribal officials can be held accountable for the actions they take which exceed the scope of their authority. At this stage of this case, assuming the facts in a light most favorable to Davis, it appears that she has sufficiently pleaded malicious intent and bad faith on the part of Bankey.

The Band is again immune from suit for the alleged violations of tribal law because Davis points to no waiver or abrogation of that immunity in tribal law. The viability of Davis' tribal causes of action against Genia presents a more troublesome issue because of the lack of particulars with regard to specific allegations against Genia. Insofar as the complaint alleges that Genia violated Davis' right to equal protection of the law by failing to take corrective action against Bankey or by failing to properly supervise Bankey and other officers, the Complaint is barred by sovereign immunity because these alleged omissions were not done with malicious intent and in bad faith. There appear to be no allegations against Genia that he sexually harassed Davis either so any cause of action for sexual harassment against Genia is similarly dismissed. There is one specific allegation that

Genia met with Bankey and Pemberton after the Administration Policy Board met and after that meeting Pemberton suspended Davis. The complaint may insinuate that Genia instructed Pemberton to suspend Davis for going to the Administration Policy Board, but it does not explicitly allege such. Being restricted to allowing suits against tribal officials only if they acted with malicious intent and in bad faith compels this Court to require more of Plaintiffs than mere insinuations. This Court will dismiss all tribal causes of action against Genia without prejudice to the rights of Davis to file a second amended complaint alleging, with specific particularity, what actions Genia took with malicious intent and in bad faith which violated her rights.

D. CONCLUSION

For the reasons stated herein, all causes of action alleged against the Mille Lacs Band of Chippewa Indians are dismissed. The causes of action against Genia and Bankey, in both their official and individual capacities, alleging violations of 42 U.S.C. Section 1983, 42 U.S.C. Section 1985, the equal protection clause to the fourteenth amendment, the Minnesota Human Rights Act, the Minnesota Whistle-Blower statute, and common law claims for negligent hiring and retention and negligent infliction of emotional distress are dismissed on the ground that they fail to state claims upon which relief can be granted. The motion to dismiss the causes of action against Bankey in his official and individual capacities for violation of the Plaintiff's right to equal protection assured her under Band statute and the Minnesota Chippewa Tribal Constitution is denied. The motion to dismiss the causes of action against Genia arising under Band statute and the Minnesota Chippewa Constitution is granted without prejudice to the right of Davis to file a second amended complaint pleading specific acts of malicious intent

and bad faith by Genia which violated her right to equal protection under Band law. Counsel for the Defendant Band and Genia are instructed to draft an appropriate order for the Court's signature implementing this memorandum decision.

Dated this 30th day of September, 1996.

BY ORDER OF THE COURT:

/s/
Special Magistrate B.J. Jones

ATTEST:

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

GINA DAVIS Civil 5-95-187

Plaintiff,

v. **ORDER**

MILLE LACS BAND OF CHIPPEWA INDIANS, JAMES GENIA, individually, and in his official capacity as Tribe Solicitor General and supervisor of the Mille Lacs Tribal Police Department, and R. JAMES BANKEY, individually, and in his official capacity as Chief of Police of the Mille Lacs Tribal Police Department

Defendants,

Mavity and Ryan, by WILLIAM J. MAVITY, Minneapolis, Minnesota appeared on behalf of Plaintiff,

Schatz, Paquin, Lockridge, Grindal & Holstein P.L.L.P. by LINDA HOLSTEIN, Minneapolis, Minnesota appeared on behalf of Mille Lacs Band and James Genia.

McDonough, Wagner & Sherry P.A. by JOSEPH PLUMER, Apple Valley, Minnesota appeared on behalf of R. James Bankey.

The above-entitled matter came on for hearing before the Court on January 5, 1996 upon the Defendant's motion to dismiss or in the alternative to stay all claims (docket no. 5).

The case concerns a female tribal police officer's allegations of sexual harassment and retaliatory conduct by her supervisors Chief Bankey and Solicitor General Genia. Plaintiff's complaint alleges eight separate causes of action including: sex discrimination in violation of the Minnesota Human Rights Act (MHRA), reprisal in violation of the MHRA, discrimination and retaliation in violation of the Minnesota Whistle-Blower statute, acts in violation of 42 U.S.C. § 1983, acts in violation of 42 U.S.C. § 1985, a violation of equal protection under the Fourteenth Amendment, negligent supervision and retention, and negligent infliction of emotional distress. Plaintiff did not seek relief in the tribal courts before commencing her action in this court.

Defendants contend that this court cannot exercise jurisdiction so as to consider the merits of Plaintiff's claims unless and until Plaintiff exhausts all tribal court remedies. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1977) the Supreme Court observed that Indian tribes have long been recognized as possessing the common-law immunity from suit enjoyed by sovereign powers. Id. at 58 (citation omitted). While this immunity can be waived, it "cannot be implied but must be unequivocally expressed". Id. (citation omitted).

Plaintiff argues that the Mille Lacs Band waives immunity from suit for the claims brought by Plaintiff in Minnesota Statute § 626.90 (Supp. 1985). Section 626.90 gives the Mille Lacs Band the powers of a law enforcement agency provided that they comply with certain conditions. One condition is that the "band agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of a law enforcement agency function conferred by this

section". MSA § 626.90 Subd.2(1). Plaintiff asks the Court to find that this provision waives immunity for actions like those involved in this suit.

The Supreme Court and the case law of the Eighth Circuit show that the question of whether the Tribal Courts have jurisdiction or have waived immunity from suit is to be answered in the first instance by the Tribal Courts. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856-57 (1984); Duncan Energy v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994) (citations omitted). Under Duncan this Court must either dismiss the case without prejudice or stay any proceedings until those remedies are exhausted. Duncan 27 F.3d at 1300. Once tribal remedies have been exhausted this Court may review the Tribal Court's determination of tribal jurisdiction. Id. at 1301. Exhaustion is not required where an assertion of tribal jurisdiction is motivated by a desire to harass, is conducted in bad faith or where plaintiffs lack an adequate opportunity to challenge the court's jurisdiction, Prescott v. Little Six, Inc., 897 F. Supp. 1217 (D. Minn. 1995) (cite omitted), however Plaintiff does not argue and there is no evidence to suggest that any of these exceptions apply in this case.

Defendants have moved for dismissal or in the alternative to stay all claims. Because the parties have been unable to agree to a dismissal without prejudice that adequately addresses the Court's statute of limitations concerns, the Court deems it preferable to stay the proceedings pending exhaustion of tribal remedies.

Accordingly, upon review of all the files, records and proceedings herein, IT IS HEREBY ORDERED That:

1. Defendant's motion to dismiss is DENIED.

2. Defendant's motion to stay all claims is GRANTED and all proceedings in this action are STAYED pending further order of this Court.

Dated: January 16, 1996.

/s/
DONALD D. ALSOP, Senior Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1469MNST

Gina Davis,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
Mille Lacs Band of Chippewa Indians et al,	*	
	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

December 9, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Ms. Pamela Marie Miller
MAVITY & ASSOCIATES
Suite 1460
1650 W. 82nd Street
Minneapolis, MN 55431

LAW ENFORCEMENT AUTHORITY OF MILLE LACS BAND OF CHIPPEWA INDIANS

626.90 LAW ENFORCEMENT AUTHORITY; TRIBAL PEACE OFFICERS.

Subdivision 1. **Definition.** As used in this section, "band" means the federally recognized Mille Lacs Band of Chippewa Indians.

Subd. 2. **Law enforcement agency.** (a) The band has the powers of a law enforcement agency, as defined in section 626.84. subdivision 1, paragraph (h), if all of the requirements of clauses (1) to (4) are met:

(1) the band agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of a law enforcement agency function conferred by this section, to the same extent as a municipality under chapter 466, and the band further agrees, notwithstanding section 16B.06. subdivision 6, to waive its sovereign immunity for purposes of claims of this liability;

(2) the band files with the board of peace officer standards and training a bond or certificate of insurance for liability coverage for the maximum amounts set forth in section 466.04;

(3) the band files with the board of peace officer standards and training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution; and

(4) the band agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) The band shall enter into mutual aid/cooperative agreements with the Mille Lacs county sheriff under section 471.59 to define and regulate the provision of law

enforcement services under this section. The agreements must define the trust property involved in the joint powers agreement.

(c) The band shall have concurrent jurisdictional authority under this section with the Mille Lacs county sheriff's department only if the requirements of paragraph (a) are met and under the following circumstances:

(1) over all persons in the geographical boundaries of the property held by the United States in trust for the Mille Lacs band or the Minnesota Chippewa tribe;

(2) over all Minnesota Chippewa tribal members within the boundaries of the Treaty of February 22, 1855. 10 Stat. 1165, in Mille Lacs county, Minnesota; and

(3) concurrent jurisdiction over any person who commits or attempts to commit a crime in the presence of an appointed band peace officer within the boundaries of the Treaty of February 22, 1855. 10 Stat. 1165, in Mille Lacs county, Minnesota.

Subd. 3. **Peace officers.** If the band complies with the requirements set forth in subdivision 2, the band is authorized to appoint peace officers, as defined in section 626.84, subdivision 1, paragraph (c). who have the same powers as peace officers employed by local units of government.

Subd. 4. **County jail.** The sheriff of the county in which the violation occurred is responsible for receiving persons arrested by peace officers appointed under subdivision 3 and acting under the authority conferred by this section.

Subd. 5. **Prosecuting authority.** The Mille Lacs county attorney is responsible to prosecute or initiate petitions for any person arrested, investigated, or detained by peace officers appointed under subdivision 3 and acting under the authority conferred by this section.

Subd. 6. **Effect on federal law.** Nothing in this section shall be construed to restrict the band's authority under federal law.

Subd. 7. **Construction.** This section is limited to law enforcement authority only, and nothing in this section shall affect any other jurisdictional relationships or disputes involving the band or current reservation boundaries or entitle the band as a municipality or subdivision of government to any fine or penalty revenue allocation under section 487.33.

History: *1991 c 189 s 1*

MINNESOTA STATUTES ANNOTATED
CRIMINAL PROCEDURE
CHAPTER 626. TRAINING; INVESTIGATION, APPREHENSION; REPORTS
PEACE OFFICER TRAINING

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Current through End of 1998 1st Sp. Sess.

626.84. Definitions and scope

Subdivision 1. Definitions. For purposes of sections 626.84 to 626.863, the following terms have the meanings given them:

(a) "Board" means the board of peace officer standards and training.
(b) "Director" means the executive director of the board.
(c) "Peace officer" means an employee or an elected or appointed official of a political subdivision or law enforcement agency who is licensed by the board, charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and who has the full power of arrest, and shall also include the Minnesota state patrol, agents of the division of alcohol and gambling enforcement, state conservation officers, and metropolitan transit police officers.
(d) "Constable" has the meaning assigned to it in section 367.40.
(e) "Deputy constable" has the meaning assigned to it in section 367.40.
(f) "Part-time peace officer" means an individual licensed by the board whose services are utilized by law enforcement agencies no more than an average of 20 hours per week, not

including time spent on call when no call to active duty is received, calculated on an annual basis, who has either full powers of arrest or authorization to carry a firearm while on active duty. The term shall apply even though the individual receives no compensation for time spent on active duty, and shall apply irrespective of the title conferred upon the individual by any law enforcement agency. The limitation on the average number of hours in which the services of a part-time peace officer may be utilized shall not apply to a part-time peace officer who has formally notified the board pursuant to rules adopted by the board of the part-time peace officers intention to pursue the specialized training for part-time peace officers who desire to become peace officers pursuant to sections 626.843, subdivision 1, clause (g), and 626.845, subdivision 1, clause (g).

(g) "Reserve officer" means an individual whose services are utilized by a law enforcement agency to provide supplementary assistance at special events, traffic or crowd control, and administrative or clerical assistance. A reserve officer's duties do not include enforcement of the general criminal laws of the state, and the officer does not have full powers of arrest or authorization to carry a firearm on duty.

(h) "Law enforcement agency" means a unit of state or local government that is authorized by law to grant full powers of arrest and to charge a person with the duties of preventing and detecting crime and enforcing the general criminal laws of the state.

(i) "Professional peace officer education" means a post-secondary degree program, or a nondegree program for persons who already have a college degree, that is offered by a college or university in Minnesota, designed for persons seeking licensure as a peace officer, and approved by the board.

Subd. 2. Scope. Notwithstanding sections 12.03, subdivision 4, 12.25, or any other law to the contrary, no individual

employed or acting as an agent of any political subdivision shall be authorized to carry a firearm when

* * * * * *

Citation Search Result Rank 1 of 1 Database
MN ADC 6700.1600 MN-ADC
Minnesota Rules, part 6700.1600
Minn. R. 6700.1600

TEXT

MINNESOTA RULES
BOARD OF PEACE OFFICER STANDARDS AND TRAINING CHAPTER 6700. TRAINING AND LICENSING
TRAINING AND LICENSING
Current with amendments adopted through August 10, 1998.

6700.1600 VIOLATION OF STANDARDS OF CONDUCT.

Violation of any of the following standards of conduct by a licensee constitutes grounds for disciplinary action:

A. engaging in conduct prohibited by, or listed as, grounds for disciplinary action in this chapter, Minnesota Statutes, chapter 214, or sections 626.84 to 626.90, or engaging in conduct which violates any statute enforced by the board;

B. obtaining a license from the board by fraud or cheating, or attempting to subvert the examination process;

C. being convicted of a felony or gross misdemeanor in this state, or in any other state or federal jurisdiction of an offense that would constitute a felony or gross misdemeanor if committed in Minnesota including a finding or verdict of guilt, whether or not the adjudication of guilt is withheld or not entered, an admission of guilt, or no contest;

D. having been the subject of revocation, suspension, or surrender of a peace officer license or certificate in resolution of a complaint or other adverse action relating to licensing or certification in another jurisdiction;

E. failing to report the revocation, suspension, or surrender of a license or certificate in resolution of a complaint, or other disciplinary or adverse action taken against a licensee in this or another jurisdiction, or having been refused a license or certificate by any other jurisdiction;

F. being convicted of a state or federal narcotics or controlled substance law irrespective of any proceedings under Minnesota Statutes, section 152.18, or any similar law of another state or federal law;

G. being adjudicated by a court of competent jurisdiction, within or without the state, as incapacitated, mentally incompetent, chemically dependent, mentally ill and dangerous to the public, or as having a psychopathic personality;

H. violating any order issued by the board;

I. practicing outside the scope of Minnesota Statutes, section 626.863;

J. making an intentional false statement or misrepresentation to the board;

K. engaging in sexual penetration or contact without consent, as defined in Minnesota Statutes, section 609.341, or engaging in conduct that violates Minnesota Statutes, section 617.23. Sexual contact does not include contact that is part of standard police procedure such as search and arrest;

L. being convicted, including a finding or verdict of guilt, whether or not the adjudication of guilt is withheld or not entered, an admission of guilt, or a no contest plea of a violation of Minnesota Statutes, sections 518B.01, subdivision 14; 609.23; 609.231; 609.342; 609.343; 609.344; 609.345; 609.3451; 609.43; 609.465; 609.466; 609.52; 609.53; 609.748, subdivision 6; or 626.557;

M. failing to cooperate with an investigation of the board as required by part 6700.1610, subpart 4;

N. engaging in sexual harassment, as defined by Minnesota Statutes, section 363.01, subdivision 41;

O. using deadly force when not authorized by Minnesota Statutes, section 509.066; or

P. being convicted of solicitation, inducement, or promotion of prostitution in violation of Minnesota Statutes, section 609.322, or any conviction under Minnesota Statutes, section 609.324, or being convicted of similar offenses in another state or federal jurisdiction.

CREDIT

Statutory Authority: MS s 214.10; 214.12; 626.843; 626.845

History: 9 SR 2701; 11 SR 2337; 18 SR 1961; 20 SR 828

MN ADC 6700.1600
END OF DOCUMENT

TRANSCRIPT OF PROCEEDINGS BEFORE THE HOUSE JUDICIARY COMMITTEE, APRIL 12, 1991, REGARDING HOUSE FILE 1125, ENACTED INTO LAW, As AMENDED AS MINN. STAT. § 626.90

Chair, Rep. Vellenga: Is there anyone who would like to move House File 1125. Representative Waitsmen... alright, Representative Koppendrayer.

Rep. Koppendrayer: Thank you. Madam Chair and members of the Committee, I have a delete-everything amendment to House File 1125.

Chair: That's being passed around, Representative Koppendrayer, and we will adopt it as soon as everybody has it. Do you want to go ahead and starting explaining the bill?

Rep. Koppendrayer: Thank you. Madam Chair and members of the committee. House File 1125 gives the Mille Lacs Band of Chippewa Indians the right to enter into an agreement with the Mille Lacs County Sheriff's Department whereby they can do law enforcement with their own people in the designated areas that are described under this bill and if I may just give you some background as to the reason for this, if you remember in 1953, the U.S. Government retroceded to the States under Public Law 280, the right for the states to do law enforcement over the Indian tribes in the state. Since that time several Indian bands and tribes have entered into a retrocession agreement. The Minnesota Band of Chippewa Indians is in the process and has been for several years working an a retrocession agreement whereby Minnesota would in turn retrocede the right of law enforcement back to the United States and then the U.S. Government would give that law enforcement back to the tribes. But that is a long process and that involves both civil and judicial whereby they

would build their own jails and do their own civil law also. In the interim period of time, since on the Mille Lacs Reservation we are in the process of opening a Casino this spring. There's a lot of concern about law enforcement on the Mille Lacs trust land and the Mille Lacs Reservation. Consequently, for the interim this Bill gives the right as I said to the Mille Lacs Band of Chippewa Indians, the right to enter into an agreement with the Mille Lacs County Sheriff's Department to do concurrent law enforcement.

Madam Chair, I have with me Anita Fineday, a representative of the Mille Lacs Chippewa Band. We also have Mille Lacs County Commissioner, Representative, Mille Lacs County Sheriff of the Minnesota Department of Public Safety, all of whom have worked together to make this agreement possible. And if you wish, we can have them all testify. If it's not necessary, we will not.

Chair: Representative Koppendrayer, we will see if members have questions. I think first, now that all members have copies of the delete-everything amendment. Do you have any verbal amendments to this before we totally adopt it?

Rep. Koppendrayer: There are some technical amendments to the delete everything amendment and that is on page 2, line 16, we would take out Mille Lacs Band, and insert Minnesota Chippewa Tribal. One line 25, it says "full time peace officers" and I was told that it's redundant language because under Section 626, that refers to only full time peace officers, so those two words could be taken out. So strike "full time". Then on page 3, line 5, strike the word B, and strike all of line 6. On line 7, Mille Lacs Reservation or. So what it says is "nothing in this section shall affect any other jurisdictional relationships."

Chair: Alright, hearing the verbal technical amendments, Representative Solberg moves the delete-everything amendment HA91-282 and this is to put the Bill in order. All in favor of the motion, say Aye, the proposed motion prevails. The amendment is adopted. Ms. Fineday.

Ms. Fineday: Yes, thank you Madam Chair, members of the committee. This Bill addresses a significant need on the Mille Lacs Reservation. For several years we along with Mille Lacs County have agreed that there has been a need for increased law enforcement on the Mille Lacs Reservation. The Mille Lacs Reservation has the highest crime rate in Mille Lacs County and Mille Lacs County has lacked the resources to meet that need. The reasons for the county being unable to meet this need are several. One of them is the monetary resources to hire the staff that we need. The other is geography, if you will note this map, the Mille Lacs Reservation lies at the far north end of Mille Lacs County, the County Seat is in Milaca and often response time to the Mille Lacs Reservation has been very slow. Some of the other reasons for need for increased law enforcement on the Reservation is the fact that the Mille Lacs Reservation is in the heart of a tourist area. We are on the South Shore of Lake Mille Lacs, which I think is one of the busiest tourist areas in the State of Minnesota. This has created a significant problem on the Reservation. Over the past several years, we have discussed this need for law enforcement with Mille Lacs County. Within the past year, we have meet several times with the Mille Lacs County commissioners, the Mille Lacs County Attorney, and the Mille Lacs County Sheriff, and all of those entities support this Bill. In addition to those entities, we have worked with the P.O.S.T. board, the Attorney General's office and the department of Public safety in drafting this Bill. I believe that all of those agencies will agree that this Bill solves the problems that we have been

experiencing on the Mille Lacs Reservation. I would stress that the authority that is granted to the Mille Lacs Reservation to become a law enforcement agency of the State of Minnesota places upon us the same requirements that are placed upon any other officer in the State of Minnesota in that our officers will have to be P.O.S.T. board certified and we will have to provide liability insurance to cover the torts of our officers. That liability insurance requires us to carry the same limits as any other municipality. This Bill can be paralleled to giving us the powers of a municipality within the State of Minnesota.

Chair: Are there any questions to Ms. Fineday?

Rep. Hasskamp: Thank you. Since I have traveled through your County every weekend, it's adjacent to my County, and because I came home Sunday night and saw the grand opening of your Grand Casino. Is this sort of a timely issue now that you have this, because I noticed a lot of traffic going to that casino. Could you give me an idea of the kinds of problems that you're seeing, what kind of crimes you're dealing with that are things that you can't handle by the sheriff's department, things that you envision doing, dealing with it mostly.

Ms. Fineday: Yes, our casino opened last week, so it's difficult at such an early point to be able to talk about the problems that we're going to experience due to the opening of that casino, but as I said, law enforcement problems have been a significant issue on the Reservation for several years. One of the problems has been DWI's. Our Reservation police officer is here to speak to that issue directly, but one of the problems that we have experienced under the DWI statues as they are written now, an officer must be a peace officer of the State of Minnesota in order to invoke implied consents. So

when Reservation officers have pulled over drunk drivers, they've been unable to refer them on to the County Sheriff for prosecution.

Rep. Hasskamp: Madam Chair, would that include like any other kind of traffic violations as well? Speeding or anything like that.

Ms. Fineday: Yes, we have a variety of traffic problems that we have experienced and we do expect that those will increase with the opening of the casino.

Rep. Koppendrayer: Representative Hasskamp, if I could ask [inaudible] The opening of the casino is more or less a timing, but this is more or less coincidental. This has been worked on for quite a while, but I think that in our county it gives the band members the opportunity to have their own police force which can be more responsible in a culturally sensitive way which we probably never will be able to survive, as you know working with other cultures in other countries and I understand from those experiences, unless you're part of the culture, you can't be as culturally sensitive as the people themselves, and I think this is really an opportunity for them [inaudible].

Chair: Then you would be hiring members of your own tribe then? So they'll able to handle [inaudible] amenable to your constituency too.

Ms. Fineday: Yes, I believe so.

Rep. Solberg: Well, just, I think maybe the sheriff wanted to testify to this. I also have some deep concerns about this. I live in the county that has as a major part of its county, a Reservation. Quite frankly, the law enforcement is the

responsibility of the sheriff. The sheriff has been very sensitive to the cultural differences that exist between the Native American community and the other part of the county. I have worked over the years very cooperatively with that group to make sure that people are assigned to work under him as the sheriff's deputy that they are very sensitive to the cultural differences and are sometimes also members of that culture to begin with. One of my questions on this is, resources are always scarce. [inaudible] a government period and I have over the years lived in the Native American community probably that very [inaudible] gambling proceeds have been very beneficial to their cultural in that they've been able to provide funds for their education, provide funds for relief of welfare rolls to better their people with those funds. One of my biggest concerns of this besides some of the drafting they may have some difficulty to know who you can arrest, when, where and how, is that we are in effect taking the responsibility of a local government, the sheriff, to enforce the law and then that sheriff should and has a responsibility and is elected to do equally amongst all the people. But shifting that to some other of course, [inaudible] should be going into education, and other training for those people who are using those funds. Now you say you have some difficulty in that because what I'm afraid of is I know my sheriff's budget is tight. And we know we don't have a casino the [inaudible] reservation has a casino. And he will probably say, well I don't have the resources to enforce the law on the said portion of the [inaudible] reservation that's in Itasca County. So you take funds from your casino to put the law enforcement in that park and I'm very concerned about that. That's a shift of resources, and a shift of responsibility and I see this as a way of if the sheriff doesn't want to enforce the law in the part that he's elected for, then he shouldn't be running. We are indeed shifting the responsibility. But, that's a statement, not a question, but I do have some concern on

page 2, line 13-22, as I looked at the draft of this and I realize it's been negotiated and so forth, it looks like the proposed jurisdiction of this portion [inaudible] list has changed and is going to be over all people in the geographic boundaries of the property held by the United States in Trust for the Mille Lacs Lake Band. All people. Some of that land isn't in trust land anymore. So, depending upon where I happen to be, [inaudible] they can arrest me or not... whether or not I'm committing a crime.

Rep. Koppendrayer: As Ms. Fineday stated before, it will be somewhat, as a matter of fact, like a town. If you're in the town of Princeton, which I'm familiar with, the Princeton police have jurisdiction and can arrest you if you go outside of the town, the sheriff has jurisdiction over the county roads, but the sheriff also has concurrent jurisdiction within the town and this will be the same case on the trust land.

Chair: Just one clarification though. I thought some of the land within that geographic boundary had been sold, or is not trust land anymore. Like small bits of land, a lake lot and some other land that does not fit under the definition of the trust land. Is that correct? Or is that [inaudible] inclusive?

Rep. Koppendrayer: You're correct in saying that there are difference categories of jurisdiction created. The red outline on this map outlines the treaty area under the treaty of 1855. That's the land that was set aside for the Band. The land that's trust land within those boundaries is scattered throughout those three townships. It is not a solid block of land that's held in trust for the Band. So the trust land, there is a distinction made between our jurisdiction on trust land and our jurisdiction within the full Reservation boundaries.

Chair: What I see us creating here is another analogy for the policeman in Princeton to be able to arrest me if I'm on this lot, but not if I'm on this lot over here. Because the ownership of that lot is different. And that has some confusion. It's not very geographically, even though it's [inaudible], it also changes jurisdiction within that.

Ms. Fineday: Yes, I think that if you'll looking on page 2, line 19, we think we have resolved that problem by giving concurrent jurisdiction to the tribal Police officer over anyone who commits a crime or attempts to commit a crime in his presence. So that would give him jurisdiction throughout the full Reservation boundaries when a crime is committed in his presence.

Rep. Koppendrayer: One other thing on section 2, [inaudible], Minnesota Chippewa Tribe members within the boundaries. One of the things that's different about them, we just went through a very emotional debate of sexual orientation and whether or not somebody's going to be identified by looking at the, whether or nor they have certain sexual orientation and I have a little bit of difficulty with saying that because I might looking in or not looking in whatever that means, I might be arrested or I might not be arrested, or someone may have jurisdiction over me or may not have jurisdiction over me. But anybody can arrest anybody on a citizens arrest, but it's much more difficult.

One thing I don't want to do is have people staffed what they are and report it. If I can respond, the Mille Lacs County Sheriff still has jurisdiction over all those people in Mille Lacs County. So he doesn't have to make any differentiation. Those small areas that are outside of the trust land are areas that are occupied mostly by families that belong to the tribe that live outside of the trust land and those people are known

by the tribe member who will be the certified law enforcement agent.

Rep. Carruthers: Madame Chair, I'm looking at page 2, line 9, it says the band shall have concurrent jurisdictional authority. And then over all persons in the geographical boundary. Is that strictly peace officer powers or is that go beyond into judicial power? The power to conduct a trial or to put a sentence on or anything like that?

Ms. Fineday: Madame Chair and Representative, I believe we've addressed that in subdivision 7 on page 3 at line 4, where we say that this section is limited to law enforcement authority only and also Representative Koppendrayer has pointed out to me that at page 2, subdivision 5 at line 32 where it's expressly stated that the Mille Lacs County is responsible for prosecuting.

Rep. Carruthers: So let's find a, I'm talking about more than simple prosecution authority. I'm also talking about judicial authority. So there is and Representative Koppendrayer can answer this -- there's no legislative intent whatsoever in this bill that the Band would have judicial authority over a person arrested under this particular bill?

Rep. Koppendrayer: No, and in fact it is filled out that the sheriff will receive them into jail and that the attorney is the only one that can prosecute those arrested.

Chair: My question went the next step then what about Representative Koppendrayer, what about judicial authority?

Rep. Koppendrayer's: Well it's my understanding that judicial, Madam Chair, Representative Carruthers, that

judicial authority is that not in the hands of the county attorney?

Rep. Carruthers: No, I'm talking about judges.

Rep. Koppendrayer: If the county attorney is the designated prosecuting attorney then he has to present his case before the district judge who would be judicial authority in that case.

Chair: My question is is the judicial authority, you're saying that that is the Minnesota district court not the Band's court?

Rep. Koppendrayer: Madam Chair, Representative Carruthers: That's correct. That's my understanding in way of the intent of this legislation.

Rep. Thompson: Thank you Madam Chair, Representative Koppendrayer, I don't oppose this legislation, in fact, I'm very sympathetic to the intent of it just as I was sympathetic to the intent to cross-deputize on the White Earth Reservation. I think a year ago or two years ago. I just want to be careful that we don't cause more problems than we solve. Have you talked to Representative Kinkle? Because the cross-deputization was his bill and I think before it was all over, he withdrew it. Have you had any open meetings in the district about this?

Rep. Koppendrayer: Madam Chair, Representative Thompson, I'm not familiar with Representative Kinkle's cross-deputization bill or what county that applied to but it certainly wouldn't apply to Mille Lacs County. However, I might add that once this is in place, and the P.O.S.T. board certified officers are hired by the Mille Lacs Chippewa Band, they and the Mille Lacs County Sheriff Department plans to look ahead to the possibility of cross-deputization. And if I

may add, it is my understanding they can do that within the county, that doesn't have to come before the legislature.

Chair: Our question for Ms. Fineday. This bill does not give any civil or criminal jurisdiction to the tribal court over nonmembers of the Band, is that correct?

Ms. Fineday: Yes, Madam Chair and Representative, that's correct.

Chair: Holland Laak had asked to testify. Do you want to come forward now?

Mr. Laak: Madam Chair, Members of the Committee, I'm Holland Laak, Executive Director of the Minnesota State Sheriff's Association. I have been in that capacity since 1982. Prior to that time, I was a sheriff for four terms in Freeborn County. I am here, Madam Chair and members of the committee, to talk basically in opposition to this legislation and I hope to bring some points to your attention that will help look more thoroughly, most thoroughly into the legislation. My board of directors met on April 5 in their regular monthly session. The board of directors is made up of representatives from all parts of the State of Minnesota with its regular slate of officers. At that time, they reviewed House File 1125 as it was in its original form before amended here today and they voted unanimously to oppose the concept and the content of that bill. At that time, they heard from Sheriff Zimmer, Mille Lacs County Sheriff, and they also heard from Sheriff Rick Paster, the Aitkin County Sheriff, and as you know Aitkin County borders into a Mille Lacs lake area and there are some reservation land there, I understand in Aitkin County. I had had a meeting previously on the 29th of March with Ms. Fineday and Jim, the police officer there, Bankey, and I invited them to be represented to present their side on

this legislation at our board of directors meeting. No one appeared at that time as they were invited to do. Basically, Madam Chair, members of the committee, a number of concerns had been raised relative to this legislation. First of all, I think you need to recognize the fact that this is precedent setting. Knowing that we have a number of Reservation areas in various counties in the State of Minnesota that if this bill were to be made law, it would spread, I'm sure, across the state and I raise that question because we see this legislation as being unclear and that it is superficial in nature and does not get into the same corners of law enforcement jurisdiction, court jurisdiction and the like. There's been a need demonstrated in testimony here today but we have to think that the need as presented today and the need that were expressed to us from other sources is not that great. Basically, although the timing has been referenced here, there has been a need expressed to have more personnel on the reservation because of the casino. I recognize the fact that there will be an influx of many thousands of people through that in the course of each year and on a daily basis. But I'd like to point out to you that resolution to security and handling situations as they might occur at the casino are handled in other jurisdictions very simply without the aid of a massive law that's going to upset the peace officer process here in Minnesota. Security people can be hired to work in the casino and they can be hired or contracted with by the Band. Criminal matters that might occur at the casino are not that likely but should they occur, the matter could be handled by the sheriff's office in its normal course of duty. The Leech Lake Reservation has a casino and they do it this way. They have no problems there to speak of. Cass Lake has had their operation, their gambling operation six years and Walker just recently opened their gambling operation. I think this demonstrates the fact that there are alternatives to legislation which are intended to resolve the problem and those

alternatives could be explored. I could elaborate even further on what they might be but the point is that they are simple and uncomplex and would not call for massive law change in Minnesota. It's been referenced here today several times that this law would establish the "municipality" and would represent that type of form of government or at least the concept and I'd have to submit to you as legislators in all due respect that is not the case. The legislation calls for the usage of peace officers on the reservation and it does not establish a municipality per se. Secondly, I don't know that legally if it's at all possible to establish a municipality under those circumstances on the tribal land and I'm not being a legal expert, I don't know that. But the point being that they're not establishing with this legislation a municipality. The point is made in the bill at section 626.84 under peace officer training. If you look at that under section 1, subdivision H, it says "law enforcement agency", this is under definitions, means a unit of state or local government that is authorized by law to grant full powers or arrest and charge a person with the duties of preventing and detecting crime and enforcing the general criminal laws of the state. That could not happen with this legislation being used as a vehicle. Beyond peace officer powers, you have peace officers powers and duties that extend beyond the jurisdiction that would be established for these Mille Lacs Band peace officers. It goes beyond that. As you know, state peace officers have statewide authority and they would not in effect be bound by the geographical area as described.

Chair: Excuse me, Sheriff Laak. Are you almost finished?

Mr. Laak: Just about. Because I know a couple of people have questions. Okay. I will be glad to stand for questions, Madam Chair. Again, I could get quite lengthy in talking about matters that make this legislation be not as clearly

definitive as it should be. I mention the establishment of the law enforcement agency. From that, there are many other things that would come into play. For example, statute 169 dealing with police officer vehicles. Because the reservation could not be established as a municipality, they would have no law that would apply here that would require them to have proper law enforcement vehicles. In any arrest, I think that would be made or at least all of the arrests that would be made, the first challenge in a court of law would be the jurisdiction of that peace officer. It's not clear, the law doesn't make it clear. And I guess to preempt myself or, pardon me, to regress a little bit, I'm saying that this is a matter that should not be considered. I think that at this point in time, it's premature and, secondly, that it needs to be made into a full study so that all aspects that would reflect from that situation being established need to be explored and covered adequately and clearly in legislation. There's too many whereas and what if's and again not to take any more of your time, we could get into that for the balance of the afternoon. It's not comprehensive in nature and I will not attempt to cover all the basis in that regard. So, thank you Madam Chair.

Rep. Marsh: Thank you, Madam Chair, Holland, if this bill helps gets more folks, if you will, involved in law enforcement, if they meet all the criteria, especially as it relates to the reservation, what am I missing? What's wrong with having some additional security? I guess I'm not quite following the argument. Maybe I'm missing something.

Rep. Koppendrayer: Madam Chair, the original bill as was alluded to when we started out with. It was my understanding that the Mille Lacs County Sheriff took the original bill to the Sheriff's Association and after the objections there were expressed with the Mille Lacs County Attorney and the Mille

Lacs County Sheriff, we did delete all amendment, which to my understanding in talking to the attorney and the sheriff, addressed those issues that were brought up at that time. No. 2 as far as the casino is concerned, the casino itself is going to have, I met with the management board of the casino, and they will provide security within the casino property which meets the approval of the Mille Lacs County Sheriff and the Chippewa Band. It's after the people leave the casino and leave the casino property and go out on the road that we're concerned about. No. 2 the Chippewa Band already has approved cars and the Mille Lacs Band as a municipality does not exist as a municipality but exists in Mille Lacs County on trust property as a sovereign nation so have the right to have their own vehicles, etc. I'll stop there.

Rep. Marsh: Madam Chair, Mr. Laak did not respond to my questions.

Chair: Your question was directed to Sheriff Laak? Sheriff Laak.

Mr. Laak: Madam Chair, Representative Marsh, There is no need. As Representative Koppendrayer just told you, they have security there now apparently and they do law enforcement on their own reservation presently. So what effect does it have an the rest of the state Highway 169 or whatever to establish a tribal law enforcement agency there? State Highway Patrol is intact. If anybody has ever driven on Highway 169 during fishing session, they know that there is enforcement there. There is immense traffic but there is enforcement there and so what need would we have to establish another layer of law enforcement for that geographical area?

Rep. Seaberg: Thank you Madam Chair: Either Representative Koppendrayer or Mr. Laak. Would this strike everything in this amendment that's on here or maybe Ms. Fineday can answer this, do the local sheriffs support the bill in its present status or not?

Rep. Koppendrayer: If I might respond. We asked the local sheriff and he's here. And we could have him attest to that. If the chair would like, I would like Nancy Bode from the Department of Public safety who worked with some legal angles of the safety issue. Ms. Bode, if you could come forward?

Chair: Did you hear the question Ms. Bode?

Ms. Bode: No, Madam Chair, I'm sorry. Would you repeat the question.

Rep. Seaberg: Thank you Madam Chair, Ms. Bode, my question is would the amendment or the bill in the present condition its in with this new amendment, my question was do the local sheriffs support the bill or not? Maybe you're not the proper person to ask? But you could probably give us some insight.

Ms. Bode: Madam Chair, Rep. Seaberg: It is my understanding we've talked to Sheriff Zimmer who is here today, who is the sheriff of Mille Lacs County, that he does support, the county does support legislation as amended. In addition, there's, I think the reason they support it, is they understand this municipality concept. As Representative Koppendrayer pointed out, the Band is not going to become a municipality. But use of the municipality concept is simply an analogy for law enforcement purposes. As a municipality, you can have a law enforcement officer and the sheriffs of

course can come in the municipality. So to the Band will be as an analogy for law enforcement purposes have an officer but the sheriff may come in there.

Rep. Seaberg: Just on that point. How about if there were [inaudible] trust land be if you're on trust land or not on trust land changes the jurisdiction of one and that's not necessary very clear.

Ms. Bode: Madam Chairman, Representative: I think the best analogy under that section would be an page 2. In that the first section of C1 is the area in which the Band's officers has jurisdiction over anyone in that area. Over a larger area of land, which is represented in C2, the officer has jurisdiction over tribal members. And in all other areas of course is a law enforcement officer recognized as a law enforcement officer. He will have jurisdiction as noted in no. 3 for any crimes committed in his presence. What I think the bill does is uniquely blend federal law which describes where the tribe the reservation already has jurisdiction namely over members with the need to describe in discrete terms what is the geographic area of this imaginary municipality and that is described for you in C1. C2 really reflects what is already federal law. The Band has authority over its own members and C3 helps point out that as a law enforcement officer, a post board certified officer, he would have jurisdiction over any crime committed in his presence.

Rep. Solberg: [inaudible]

Rep. Koppendrayer: Madam Chair, Rep. Solberg: First of all, if they're committing a crime, there's jurisdiction. Because they're in the presence of an officer and if they're committing a crime, he has jurisdiction. Other than that, as I explained

before, its tribal members or everyone within an easily-defined area.

Chair: Ms. Bode, can you, maybe this has been said, I had to go out for a while during this bill, but are there other reservations in Minnesota, North Dakota, South Dakota, Wisconsin that have a similar type of arrangement to what is in Representative Koppendrayer's bill?

Ms. Bode: Madam Chairman when we first met to discuss this problem, and came up with this sort of solution to this problem, I was not aware of any. I have since heard from Ms. Fineday that there apparently are some other models like this in other states. I have not seen them.

Chair: Maybe we should get Ms. Fineday back to see if she can tells us about other states that have a similar or if Mr. Bankey wants to. Ms. Fineday did you hear the question.

Ms. Fineday: No, would you repeat it.

Chair: Yes. My question of Ms. Bode was are there other reservations in the states in the upper midwest, North Dakota, South Dakota, Wisconsin, Michigan or elsewhere in the country where they have a similar arrangement? Ms. Bode answered that when this proposal came up, she was not aware of any but that she said you had said that there were other states with a similar model. Could you tell us about them?

Ms. Fineday: Yes, Madam Chair. When we first began drafting this, we were not aware of any situations similar to this. Since that time, I have had discussions with the Bureau of Indian Affairs in Washington, D.C. and they have informed me that the Seminole tribe in Florida does have a similar has similar authority under the state law and that they believe

there was one other tribe but no one could remember the name of it. So, as far as I know, only the Seminoles in Florida have a similar grant of authority.

Chair: Thank you.

Rep. Solberg: I think this [inaudible] of legislation is obviously [inaudible].

Chair: Pertaining to that motion which is non debatable, I don't know if you want to say interim state but later. Representative Koppendrayer, is this bill moving in the Senate that you know of?

Rep. Koppendrayer: Madam Chair, it will be heard in the Senate on Monday. I haven't been here very long but I know that's a good way to kill a bill. Obviously on the last day and there has been, if I may Madam Chair, there has been years of work gone into this agreement. And everybody concerned has agreed.

Chair: All in favor the Solberg motion say "aye". Opposed "no". Motion does not prevail. Any further discussion? Would the sheriff of Mille Lacs County please come up? Representative Koppendrayer are also missed would the post board has taken a position on this bill. Has the Minnesota Police Officers Board taken a position on this bill? What was the question? Maybe you can just say yes or not.

William Center, P.O.S.T. Board: The board has not taken official position but we have been involved with all the parties in bringing together this particular legislation so that it requires with licensing requirements of law enforcement agencies, departments of the state.

Chair: Please identify yourself for the record sheriff.

Sheriff Zimmer: I am Jules Zimmer, the Sheriff of Mille Lacs County.

Rep. Solberg: [inaudible] Why isn't the sheriff's department of Mille Lacs County providing that area with adequate law enforcement.

Sheriff Zimmer: I believe Anita somewhat answered that question. There's two reasons. No. 1 lack of resources, lack of personnel to do the job that we'd like to do and of course the geographical lay out of Mille Lacs County. Mille Lacs county is long and narrow and its wide at the top. It's difficult to respond to all ends of the county in a satisfactory manner and as much as I hate to be at odds with the state sheriff's association, its kind of an awkward position to be in, however, I must support and I must do what's best for the people in Mille Lacs county that have put me in office. I need to see that law enforcement needs are met as a chief law enforcement officer. This is one way of enhancing law enforcement in Mille Lacs county and Representative Koppendrayer is correct in respect that a lot of work, a lot of negotiating, some compromising have taken place between the Mille Lacs Reservation and the Mille Lacs County and Mille Lacs County Sheriff's Department.

Rep. Solberg: [inaudible]

Sheriff Zimmer: We have 12 deputies in Mille Lacs County.

Rep. Solberg: Can you tell me where they live?

Sheriff Zimmer: They live throughout Mille Lacs County.

Rep. Solberg: More specially, can you tell me how many deputies that are [inaudible] or a minority race or Native American on your force?

Sheriff Zimmer: I guess I have zero deputies that are Native Americans.

Rep. Solberg: Madam Chair I guess that's my point of contention. We have very large county much larger than Mille Lacs [inaudible] Very sensitive in having deputies living near reservations [inaudible] be very sensitive to needs of those American Natives. And is has taken the limited resources and tried to do the best that we possibly can. I guess my concern is again that we're subsidizing law enforcement in [inaudible] and we should have the taxpayers pay more money for better law enforcement and be sensitive [inaudible] and not take resources that people have a right basically on their own they have law enforcement.

Rep. Brown: Madam Chair, Sheriff could you tell me the breakdown of percent of population of Native Americans in your county versus Whites or versus other.

Sheriff Zimmer: I believe the population of Mille Lacs County is approximately 20,000 people and approximately 400 to 500 are maybe Native Americans.

Rep. Brown: Okay, Madam Chair, following off of Representative Solberg's question, I think its a fair question that ought to be asked given your responses to his question. If I heard you correctly, you indicated you have 12 deputies on your force in your department. Is there a specific reason as to why they're aren't Native Americans in your employ.

Sheriff Zimmer: I have, since I have taken office in 1986, we have had two deputies leave the sheriff's department and in the hiring process, I have never had a Native American apply for a deputy position in Mille Lacs County. Prior to that, I could not answer.

Rep. Brown: Sheriff I don't want to put you on the spot to make you try to speculate the Sheriff's Association but in listening to Sheriff Laak's testimony, he started out by saying this is precedent-setting which I hear is foot in the door. In the discussion with the Sheriff's Association, I understand you were there. Did you hear concerns that your county had arranged for that would appear to work in your opinion, that the opposition was not so much that they thought it wouldn't work in Mille Lacs as that they were afraid someone would try it in their own county?

Sheriff Zimmer: That's true. The concern of a number of the sheriffs that have reservations in their counties that this would set the precedence and apparently they're able to adequately police their reservations and that would directly affect them in the long run. However, the bill that was discussed at the state board Sheriff's board of directors was the original draft and not the amendment. The amendment the State Sheriff's Association has not taken a stand on and it is monitoring that.

Chair: Sheriff Zimmer, I would like to commend you for working so long with your community. I think maybe some of us forget that each tribe is their own nation. They don't speak for each other, they don't have jurisdiction over each other. I think you and Representative Koppendrayer have done very well to work within your own community to find a solution there.

Rep. Limmer: I came in late to the discussion and I'm sure, what are we talking about? What are we talking about when we're talking of getting a foot in the door? What did you mean by that?

Chair: Representative Limmer, I was referring to Sheriff Laak's opening statement that because none of the other reservations have this kind of model in their community, he said it would be precedent settling. Again, I'm speaking for someone else, so you may want to call Sheriff Laak back as well. If you do, we'll never get back out of here.

Rep. Limmer: I'll limit my very brief questions to Representative Koppendrayer. As I look over your rather, even though it may be labeled precedent-setting, its rather simplistic in many ways. You're allowing a tribal reservation to establish its own police authority, is that the basis of this bill?

Rep. Koppendrayer: Madam Chair, Representative Limmer, that's correct.

Rep. Limmer: And that it would enforce state law or statute as well as ordinance, I don't know if a tribe can set its own ordinance or not or it certainly has its own law does it not?

Rep. Koppendrayer: Madam Chair, Representative Limmer, the Mille Lacs Chippewa Band that we're talking about is a sovereign nation and do have a lot of their own laws and rules and regulations, yes.

Rep. Limmer: So, what's precedent-setting is that they will be able to enforce Minnesota statute as well as their own law. Correct?

Rev. Koppendrayer: Madam Chair, Representative Limmer, they as its spelled out here, will if to my knowledge, if a Minnesota law is being broken, they the board-certified officer will take that person to the county jail and then the county attorney will handle whatever Minnesota laws are being broken. They already handle their tribal laws dealing with their own tribal members.

Rep. Limmer: Madam Chairman, one other question I have is its not only for the enforcement of law regarding an Indian officer to enforce law with a fellow Indian citizen but also implies that you would be that that officer would be able to enforce law if perhaps say if I was driving recklessly through that reservation and being a menace to that public that they also would be able to enforce law equally on me as well. Correct?

Rep. Koppendrayer: Madam chair, Representative Limmer, Yes as far as the Minnesota statutes are concerned but not, he would not be able to enforce any tribal law on you, who you are not a member of the tribe.

Rep. Limmer: One final question is, over the course of history, is there a reason why, I guess I have a real question of why this has never been done before. Why have we restricted perhaps by lack of attention but why have we not allowed an Indian reservation to establish its own police force for the safety of its own citizens?

Rep. Koppendrayer: Madam Chair, Representative Limmer: There is in fact, lots of tribes who do have their own law enforcement but as I said in the beginning, under Public Law 280 that right was retroceded back to the state from the U.S. Congress. Those tribes that now have that authority have went through the process of retrocession which, in which

Minnesota retrocedes back to U.S. Congress. Then they can in turn, through the Bureau of Indian Affairs, set up their own law enforcement. That process is a long process. It is being worked on, this is an interim thing that we are doing now while the process of retrocession is in the works.

Rep. Limmer: I understand. Thank you.

Rep. Carruthers: This is a bill that I think, that's been worked out with the local authorities and I agree with you that cooperation is [inaudible]. I think we should vote.

Rep. Skoglund: I have a question for the gentlemen from the P.O.S.T. board. Mr. Carter. Thank you. I think my message be loud and clear that just because this bill passes, that the sheriff's department in Mille Lacs County and all sheriff's departments should be very sensitive to the needs of law enforcement equally throughout the counties and that shifts the responsibility from one source to another source and I sure hope that they might get the message strong and clear. Your sheriff might even take this bill as a warning.

Rep. Brown: Madam Chair, I would like to respectfully submit to the sheriff if at least to this point in time, the fact of enthusiastically recruitment procedures have not and I'm not assuming that hasn't been the case, I would recommend to you in respectfully way as a fellow elected official that all attempts be made to actively recruit Native Americans within your department. I think it to be beneficial to everyone in your county and certainly to the state as a whole. I appreciate your coming down.

Chair: Representative Greenfield.

Rep. Greenfield: Madam Chair: My question for you is I'm trying to find out and I want to make certain that the peace officers that will be employed by the tribe will meet P.O.S.T. board standards and as I read the bill on page 2 as I read the language on lines 25 and 26, it says to appoint full time peace officers as defined in section 626.84, sub. 1 paragraph C. Will you assure me that that says there are going to peace board standards officers?

Mr. Center: Madam Chair, for the tape, William Carter, Executive Director of the P.O.S.T. board. Yes, they will be. By referring to the requirements of 626.84, subd. 1 paragraph C that is the definition in state law for licensed peace officers and so Madam Chair that means the peace officers who will be hired by the tribe will be every bit as qualified as the peace officers in my city Minneapolis or in any county in the state or state patrol officers or wherever there is a peace officer, a P.O.S.T. board standard officer they have to meet the same test, the same qualifications, the same moral standards as we met for all other officers. Madam Chair, Representative, that's correct.

Rep. Greenfield: So any individual who encounters these officers knows that they're dealing with top notch people and should and that there shouldn't really be any concern.

Mr. Carter: Madam Chair, Representatives, the fact that they are licensed by the State of Minnesota to practice law enforcement, their individual qualities and uniqueness within the operation of that department, would be within the jurisdiction of their employer and

Rep. Skogland: Madam Chair, Sir, this is really even though I don't see how when you take a reservation and I don't know how it can be made a municipality legally. I don't think it can

be but its really like a municipality having licensed peace officers working so its no different than when I drive through Onamia and that peace officer. I should encounter that peace officer or were would the differences be?

Mr. Carter: Madam Chair, Representative, as Nancy Bode indicated, the municipality has been used as an analogy and given the fact that the reservation is a sovereign entity or governmental unit that it needs to be carved out in statute to detail what they're actual jurisdiction is. And to do that this is why the language on page 2, lines 13 through 22 is needed and then on top of that what is done is the allowing of what their jurisdiction is and the fact that they would have peace officer jurisdiction to cover the defense and indemnification issue because they are a sovereign entity. The requirement for them to file a bond with the P.O.S.T. board to ensure to the public that there is a mechanism for defense and indemnification primarily under Federal 1983 violations.

Rep. Skogland: Considering everything that I understood to be true. I wanted this to be on the record because I don't have a concern about this bill.

Mr. Carter: Madam Chair, Representative, the board's position is neutral, we've been one of the mechanics involved in this particular legislation.

Rep. Skogland: The board's position is that we are not compromising at all the peace officers standards training clause that we put into that we have put into place. Am I correct?

Mr. Carter: Absolutely not.

Chair: Anyone else with no concerns with the bill that want to say.

Rep. Bishop: Madam Chair, Mr. Carter, than the agreement which we have offsets that they'll also [inaudible]

Mr. Carter: Madam Chair, Representative Bishop, absolutely.

Chair: Thank you Representative Bishop. Thank you Mr. Carter.

21. SEXUAL HARASSMENT

Sex discrimination and sexual harassment are against the law. It is the policy of the Mille Lacs Tribal Police to abide by the federal state laws which prohibit sexual harassment and to maintain an employment atmosphere free of sexual harassment, intimidation of coercion. The supervisory and management personnel of the Tribal Police are responsible for implementing this policy, and their success in their jobs depends, in part, on its successful implementation.

Sexual harassment of any employee by any other employee will not be tolerated. If investigation of a complaint of sexual harassment indicates that such harassment has occurred, appropriate disciplinary actions will be taken.

The following are some examples of conduct which may be legally actionable sexual harassment:

1. Use of offensive or demeaning language which has a sexual connotation.

2. Objectionable physical closeness or physical contact.

3. Unwelcome suggestions about, or invitations to, social engagements or work-related social events.

4. Any suggestion, whether direct or indirect, that an employee's job security, job assignment, conditions of employment, or opportunities for advancement are in any way dependent on the employee granting sexual favors to any other employee, supervisor, or manager.

5. Any action relating to an employee's job status which is, in fact, affected by whether the employee

granted or refused to grant sexual favors to another employee, or affected by how the employee responded to sexual advances, sexual comments, or jokes.

6. The Creation of an atmosphere of sexual harassment of intimidation, regardless of whether or not the people whose actions created that atmosphere intended to do so.

7. The deliberate or careless making of jokes or remarks of a sexual nature to or in the presence of employees who may find such jokes or remarks offensive.

8. The deliberate or careless distribution, posting, or display of materials (such as cartoons, articles, pictures, etc.), which have sexual content and which are not necessary for our work, to employees who may find such materials offensive.

All employees should be careful to treat their co-workers, subordinates, and supervisors with respect at all times.

Any employee who feels that he or she is being subjected to sexual harassment in any form, or who believes he or she has witnessed sexual harassment, should contact the Chief Law Enforcement Officer or the Commissioner of Administration.

If you believe you have been subjected to sexual harassment, you may also contact the following:

1. Minnesota Department of Human Rights
   500 Bremer Tower
   7th Place and Minnesota Street
   St. Paul, MN 55101

(612) 296-5663

2. Equal Employment Opportunity Commission
   Room 178
   110 South Fourth Street
   Minneapolis, MN 55401

   (612) 349-3494

3. Administrative Policy Board
   Mille Lacs Band of Chippewa Indians
   Onamia, MN 56359

   (612) 532-4181

No retaliation of any kind will occur because you have reported an incident or suspected sexual harassment. We encourage you to help us keep the Mille Lacs Tribal Police Dept. free of harassment.